TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 202.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

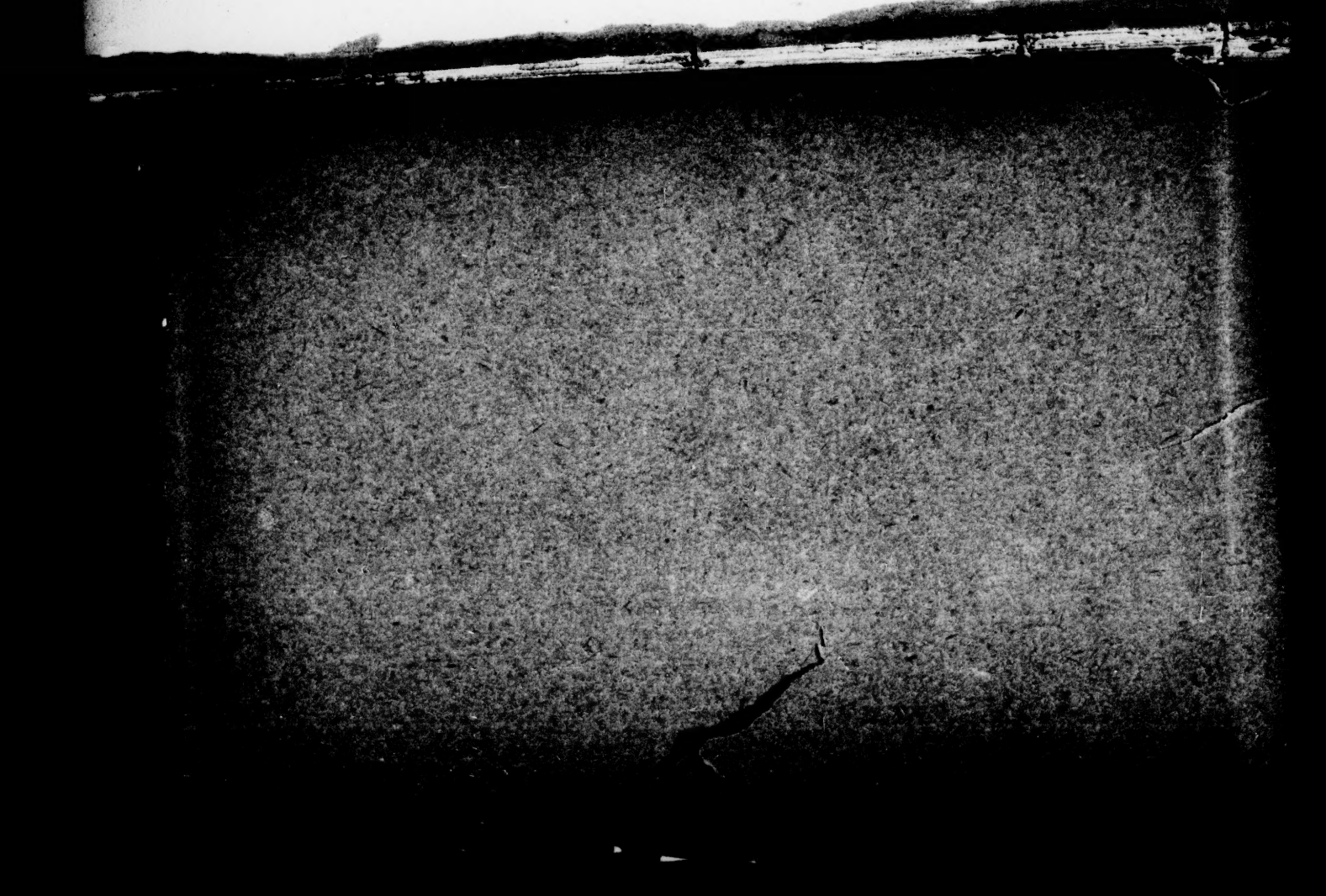
vs.

ANDREW BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 25, 1894.

(14,703.)



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1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Andrew Brown, plaintiff, and The New York, Lake Erie and Western Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the eleventh day of July, 1891, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss.*:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 2 to 263, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The New York, Lake Erie & Western Railroad Company, plaintiff in error, against Andrew Brown, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] Supreme Court of the United States. The New York, Lake Erie and Western Railroad Company, plaintiff in error, *vs.* Andrew Brown, Defendant in error. Writ of error. Buchanan & Steele, attorneys for plaintiff in error. Service of a copy of the within writ of error is hereby admitted this 11th day of June, 1891. C. L. Atterbury, attorney for defendant in error. U. S. circuit court. Filed Jun- 12, 1891. John A. Shields, clerk.

3 United States Circuit Court for the Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New
4 [L. S.] York, this 10th day of January, in the year one thousand eight hundred and eighty-seven.

TIMOTHY GRIFFITH, *Clerk.*

C. L. ATTERBURY,
Plaintiff's Attorney.

Office and post-office address, No. 58 William street, New York city.

(Endorsed:) I hereby certify that on the 10th day of January, 1887, at the city of New York, in my district, I personally served the within summons upon the within-named The New York, Lake Erie and Western Railroad Company by exhibiting to Augustus R. Macdonough, secretary of said company, the within original and at the same time leaving with him a copy thereof. Dated January

10th, 1887. M. T. McMahon, United States marshal, southern district of New York, by Geo. H. Holmes, deputy. U. S. marshal's office, S. D. N. Y. Received Jan. 10, 1887.

United States Circuit Court for the Southern District of New York.

ANDREW BROWN
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

Andrew Brown, the plaintiff herein, by Charles L. Atterbury, his attorney, complains of the New York, Lake Erie and Western Railroad Company, the defendant herein, and alleges:

First. That said plaintiff is an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland.

Second. That the defendant The New York, Lake Erie and Western Railroad Company is, and at all times hereinafter men-
5 tioned was, a corporation created and existing under and by virtue of the laws of the State of New York, and is a citizen of said State.

Third. That said defendant is, and at all the times hereinafter mentioned was, engaged in the operation of lines of railroad, extending amongst others from and near the city of Jersey City, in the vicinity of the city of New York, in the State of New York, to the cities of Buffalo and Dunkirk in said State, and to the city of Dayton, in the State of Ohio, and in the transportation of freight and merchandise for hire over the same.

Fourth. That at said Buffalo, Dunkirk and Dayton, as well as at other places, upon the lines of railroad so as aforesaid operated by it, connections were at all said times made with railroad lines extending directly or through the medium of other connections to St. Louis, Chicago and other points and places in the West.

Fifth. That by means of such railroad connections, and under and in pursuance of arrangements therefor had between the said defendant and the various railroad companies operating the lines of railroad so connecting, at all the times hereinafter mentioned, freights delivered at western points as aforesaid were transported, without breaking bulk or transfer, over the railroads of its said connections and the railroads operated by it as aforesaid to the city of New York and to the city of Jersey City, and there delivered to consignee or as directed upon through bills of lading and at rates of freight therein specified.

Sixth. That the plaintiff for many years before and during all the times hereinafter mentioned was a large shipper of logs, timber, planks, staves, &c., from the said cities of Chicago, St. Louis
6 and other points in the West, reached by the connections of the defendant as aforesaid, intended for transportation to the city of Jersey City, in the vicinity of New York, and thence by water to ports and places in England and upon the continent of Europe.

Seventh. That in the beginning of the year 1882, the defendant

company, desiring to secure the freights of the plaintiff for transportation over its lines of railroad as aforesaid, by means of the facilities afforded by its western connections as above stated, and in consideration that the plaintiff, so far as the defendant company could and would furnish facilities therefor, would ship over its said lines of railroad and connections during the said year, all the logs, timber, planks, staves and other freights controlled by him and intended for transportation from western points as aforesaid by way of said city of Jersey City to ports and places in England and on the continent of Europe, did agree to and with the plaintiff, for and during said year 1882, with respect to the shipment of his freights as above described in manner and upon terms following:

A. That it would make such rates to the plaintiff upon his said freights from the said cities of St. Louis, Chicago and from other points in the West where the same were delivered for transportation as aforesaid, to the city of Jersey City and its vicinity, as were from time to time agreed upon between plaintiff and defendant, and that in the event the rates so agreed upon should be less than the published tariff rates for the time then being, or less than the rates specified in the bills of lading issued to him by such western connections for transportation as aforesaid, that then and in every such case it would rebate and repay to the plaintiff the excess of such tariff rate or such rate specified in the bill of lading over the rate so from time to time agreed upon between them, to the extent the plaintiff should have paid the same.

7 B. That such agreed rates should be computed upon shippers' weight according to the following measurements, to wit:

On walnut logs, at 6¼ pounds per foot;
On oak plank, at 5 pounds per foot;
On poplar plank, at 3½ pounds per foot;

which weight so ascertained was to stand and be in lieu of the ordinary railroad weight as specified in the bills of lading therefor, and that it would rebate and repay to the plaintiff any excess of rate computed upon the railroad weight over the amount payable by him upon shippers' weight, as above specified, to the extent the plaintiff should have paid the same.

C. That it would rebate and repay to the plaintiff the sum of three cents per hundred pounds, computed upon shippers' weight as aforesaid upon all freights transported by it for him to Jersey City and vicinity as aforesaid.

D. That it would repay to the plaintiff the actual cost and expense incurred by him in and about the unloading of said freights from the cars in which the same arrived at Weehawken, in the vicinity of the city of Jersey City aforesaid.

Eighth. That from and after said year 1882 the said agreement was renewed between the plaintiff and defendant, year by year, down to the year 1884, the said plaintiff in all things duly observing and performing the obligations therein provided on his part to be kept and performed.

Ninth. That in the beginning of the year 1884 the said agreement was renewed for and during said year, and under and in pursuance thereof the plaintiff shipped and caused to be shipped large quantities of logs, timber, planks, staves and other freights
8 and being all of such freights controlled by him and intended for transportation from western points as aforesaid by way of said Jersey City to ports and places in England and on the continent of Europe, so far as the defendant company furnished facilities therefor, at rates which were from time to time agreed upon between them.

Tenth. That plaintiff paid in full to the defendant company in manner accustomed and as required by said defendant for all of his said shipments during said year 1884, the tariff rates upon the same and as specified in the bills of lading therefor and computed upon the weights mentioned therein, and has, in addition, expended large amounts of money in and about the unloading of his said freights at Weehawken aforesaid. That the rates so paid by him were in excess of the rates agreed upon from time to time between the plaintiff and defendant and the weights upon which the same were computed were in excess of the shippers' weights upon which it was agreed as aforesaid said rates should be computed.

Eleventh. That in pursuance of said agreement, the said defendant did rebate and pay to the plaintiff from time to time various sums of money to which he became entitled thereunder as aforesaid, and continued so to do until the latter part of said year, when said defendant refused to further keep and perform its said agreement, and did thereafter neglect and refuse to pay to the plaintiff the rebates and amounts to which he was then and thereafter became entitled under the terms of said agreement upon his shipments during said year. That there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1884, as follows:

For rebates on account of rates and weights as aforesaid, the sum of six thousand and twenty-eight $\frac{90}{100}$ dollars.

9 For rebates of 3 cents per hundred lbs. shippers' weight upon plaintiff's freights transported to Jersey City and vicinity as aforesaid, the sum of eleven hundred and sixty-two $\frac{70}{100}$ dollars.

For actual cost and expenses incurred by plaintiff in unloading his freights at Weehawken as aforesaid, the sum of five hundred and twenty-three $\frac{87}{100}$ dollars.

In all amounting to the sum of seven thousand seven hundred fifteen $\frac{47}{100}$ dollars, and an account of which the plaintiff has heretofore presented to the defendant company and demanded payment of the same, but which said company has refused and does continue wholly to neglect and refuse to pay. A schedule of the amounts so due and unpaid the plaintiff is hereto annexed, made part hereof, and marked Exhibit "A."

Twelfth. And the plaintiff for a second and separate and distinct cause of action, hereby repeating and reiterating as part hereof each and every of the allegations in the first, second, third, fourth,

fifth, sixth, seventh and eighth paragraphs of this complaint contained, further alleges:

That in the beginning of the year 1885, owing to notice theretofore and in the latter part of the year 1884 given by the defendant company that it would refuse to honor its existing traffic contracts, and would abrogate the same, including amongst them the agreement with the plaintiff aforesaid, the plaintiff made arrangements with other railroad companies for the transportation of his freights as aforesaid for the year 1885, and so advised the defendant company.

That thereupon the said defendant company, desiring and in order to retain the business of the transportation of the plaintiff's freights, offered and agreed to renew and continue the said agreement of the year 1884 upon the same terms and conditions for and during the year 1885; and further offered and agreed to pay
10 to the plaintiffs the rebates and amounts then remaining due and unpaid to him from said defendant company under his agreement for the year 1884, as hereinabove mentioned.

That thereupon the plaintiff and the defendant company did renew the said agreement in all respects as hereinbefore mentioned and set forth in the seventh paragraph of this complaint, the same to continue for and during the entire year 1885.

Thirteenth. That under and in pursuance of said agreement so renewed and continued for the year 1885, the plaintiff caused to be shipped during said year according to the terms thereof, large quantities of logs, timber, planks, staves and other freights, the same being all of such freights controlled by him and intended for transportation from western points as aforesaid by way of Jersey City to ports and places in England and on the continent of Europe, so far as the defendant company furnished facilities therefor, and at rates which were from time to time agreed upon between them.

Fourteenth. That plaintiff paid in full to the defendant company in manner accustomed and as required by said defendant for all of his said shipments during said year 1885, the tariff rates upon the same and as specified in the bills of lading thereof, and computed upon the weights mentioned therein, and has in addition expended large amounts in and about the unloading of his said freights at Weehawken aforesaid. That the rates so paid by him were in excess of the rates agreed upon from time to time between the plaintiff and defendant, and the weights upon which the same are computed were in excess of the shippers' weights upon which it was agreed as aforesaid said rates should be computed.

Fifteenth. That the said defendant has wholly neglected and refused to keep and perform its said agreement, and, though often requested, has refused and still does refuse to pay to the
11 plaintiff the rebates and amounts to which he became entitled as aforesaid under the terms of said agreement upon his shipments during said year 1885. That in addition to the amounts due and unpaid under the agreement for the year 1884 aforesaid, there is now due and unpaid for and on account of said agreement for the year 1885, as follows:

For rebates on account of rates and weights as aforesaid the sum of eight thousand forty-six $\frac{55}{100}$ dollars.

For rebates of three cents per hundred pounds shippers' weight upon plaintiff's freights transported to Jersey City and vicinity as aforesaid, the sum of two thousand four hundred forty-one $\frac{40}{100}$ dollars.

For actual cost and expense incurred by plaintiff in unloading his freights at Weehawken as aforesaid, the sum of seven hundred seventy-four $\frac{20}{100}$ dollars.

In all amounting to the sum of eleven thousand two hundred sixty-two $\frac{27}{100}$ dollars, and an account of which the plaintiff has heretofore presented to the defendant company, and demanded payment of the same, but which said company has refused and does continue wholly to neglect and refuse to pay. A schedule of the amounts so due and unpaid the plaintiff is hereto annexed, made part hereof, and marked Exhibit "B."

Sixteenth. Wherefore the plaintiff demands judgment against the defendant for the sum of eighteen thousand nine hundred seventy-seven $\frac{74}{100}$ dollars, with interest on seven thousand seven hundred and fifteen $\frac{47}{100}$ dollars, portion thereof, since the first day of March, 1885, and with interest on eleven thousand two hundred sixty-two $\frac{27}{100}$ dollars, the remainder thereof, since the first day of March, 1886, together with the costs of this action.

CHARLES L. ATTERBURY,
Plaintiff's Attorney, 58 *William Street, New York City.*

12 STATE OF NEW YORK, *ss:*

Andrew Brown, being duly sworn, says: I am the plaintiff in the above-entitled action; I have read the foregoing complaint, and know the contents thereof; the same is true of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

(S'g'd) ANDREW BROWN.

Sworn and subscribed before me this 10th day of January, 1887.

(S'g'd) W. H. SHELTON,
Notary Public (251), *City and Co. of New York.*

13 SCHEDULE "A."

Chicago & Atlantic & Erie R'ys.

No. 546. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Oct. 29 ..	6485	985	4,458	27,862	35,800	25	$107 40
Nov. 3....	6941	1165	4,217	26,356	35,000	"	105 00
" 11....	4111	1350	4,776	29,850	40,200	"	120 60
" 11....	17040	1127	4,330	27,062	35,400	"	106 20
" 18....	7259	701	3,762	23,512	30,600	"	91 80
" "	5214	774	4,026	25,162	34,700	"	104 10
" "	9479	703	4,149	25,931	33,980	"	101 94
" "	953	916	4,143	25,893	35,750	30	125 13
" 26....	7176	917	4,324	27,025	37,550	"	131 43
	9 cars.	.....	.....	238,653	.....	.....	$993 60
Agreed rate from Chicago:							
185,735 lbs. at 25 cts.....							464 33
52,918 " 30 "							158 75
							623 08
Overcharge							370 52
3 cts. per 100 lbs., allowance 238,653 lbs.....							71 59
Due Andrew Brown.....							$442 11

14 Erie, New York, Pennsylvania & Ohio, and Ohio & Mississippi R'ys.

No. 554. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weights.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Dec. 12. ..	377	462	3,912	24,450	36,320	35	$147 10
" "	4884	486	4,016	25,100	35,000	"	141 75
" "	514	528	3,781	23,631	35,000	"	141 75
" "	4885	10	3,641	22,756	28,750	"	116 44
" "	1399	11	3,568	22,300	31,000	"	125 55
" 20....	1745	12	4,646	29,037	40,400	"	163 62
" 23....	395	141	3,528	22,050	32,600	"	132 03
" "	4779	291	3,770	23,562	30,800	"	124 74
" 27....	2029	353	3,968	24,800	32,000	"	118 40
1885.							
Jan. 6....	1951	472	3,552	22,200	32,300	"	119 51
" 2....	1425	290	3,899	24,368	33,250	"	134 66
" 14....	2223	471	3,550	22,187	33,300	"	123 21
" "	169	493	3,669	22,931	32,700	"	120 99
	13 cars.	.....	.....	309,372	.....	.....	$1,709 75
Agreed rate from St. Louis to New York:							
309,372 lbs. at 35 cts.....							1,082 80
Overcharge.....							626 95
3 cts. per 100 lbs., allowance 309,372 lbs							92 81
Due Andrew Brown.....							$719 76

15 Ohio & Mississippi, N. Y., P & O., Erie R'ys.

No. 549. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Nov. 13....	4873	390	3,531	22,068	33,600	27½	$117 60
" "	703	479	4,367	27,293	36,250	"	226 88
" "	2247	478	4,136	25,850	34,550	"	120 93
" "	7039	345	3,900	24,375	32,500	"	113 75
" 18....	528	141	4,079	25,493	36,000	"	145 80
" "	2001	21	3,832	23,950	31,100	"	108 85
" 21....	1983	141	3,988	24,925	32,800	"	132 84
" "	2691	142	4,603	28,768	38,500	"	155 93
" 26....	4896	211	3,884	24,275	31,300	"	126 77
" "	1859	212	4,006	25,487	32,200	"	130 41
" 29....	2689	210	4,601	28,756	38,250	"	154 91
Dec. 1....	1103	398	4,078	25,487	35,800	"	144 99
" 12...	3393	527	3,478	21,737	31,000	"	125 55
" "	21212	530	4,310	26,937	34,600	"	140 13
" "	2561	529	4,330	27,062	41,100	"	166 16
	15 cars.			382,013			$2,011 80
Agreed rate from East St. Louis: 382,013 lbs. at 27½ cts							1,050 53
Overcharge							961 27
3 cts per 100 lbs., allowance 382,013 lbs							114 60
Due Andrew Brown							$1,075 87

16 Erie, Chicago & Atlantic, Chicago, Rock Island and Pacific R'ys.

No. 555. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Dec. 9....	14199	15	4,139	25,868	34,650	48½	$199 24
" "	15004	27	4,199	26,243	34,800	"	200 10
" 12....	14112	8	4,240	26,500	35,700	"	205 27
" "	15135	7	4,223	26,393	34,800	"	200 10
" "	14107	26	4,244	26,525	35,600	"	204 70
" "	13201	28	4,215	26,343	37,400	"	215 05
" 18....	15171	13	4,259	26,618	33,800	"	194 35
" 20....	13801	14	4,203	26,268	35,000	"	201 25
" "	15077	21	4,390	27,437	33,600	"	193 20
" 27....	15014	22	4,537	28,356	36,700	"	211 02
Jan. 2....	14003	29	4,296	26,850	34,000	"	195 50
" 8...	14139	30	4,422	27,638	34,300	"	197 22
" 19....	14070	6	4,390	27,437	33,300	"	179 82
	13 cars.			348,475			$2,596 82
Agreed rate from Leavenworth, Kansas: 348,475 lbs. at 43½ cts							1,690 10
Overcharge							906 72
3 cts. per 100 lbs., allowance 348,475 lbs							104 54
Due Andrew Brown							$1,011 26

17 No. 534. Erie, N. Y., P. & O., & O. & M. R. R's. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Sept. 10	6238	72	4,027	25,168	35,100	27½	$122 85
" "	5062	48	3,729	23,306	34,800	"	121 80
" "	19852	50	4,022	25,137	37,900	"	132 65
" 17	11258	3	4,190	26,087	35,620	"	124 67
" "	5930	77	4,000	25,100	33,600	"	117 60
" "	14181	30	3,961	24,766	30,900	"	108 15
" 24	19610	60	4,290	26,812	35,000	"	122 50
" "	2615	59	3,760	23,500	30,700	"	107 45
" 27	14781	10	3,944	24,650	34,000	"	119 00
" 29	19463	61	3,942	24,637	34,700	"	121 45
Oct. 3	5541	122	4,138	25,862	36,500	"	127 75
" "	1415	121	3,833	23,956	31,800	"	111 30
" 14	3645	87	3,813	23,831	30,000	"	105 00
" "	14892	84	3,831	23,943	24,000	"	84 00
" "	19810	123	4,158	25,987	36,000	"	126 00
" "	3029	120	3,880	24,250	32,450	"	113 58
" "	849	126	3,836	23,975	30,000	"	105 00
" "	49	142	3,893	24,331	31,000	"	108 50
" 21	847	89	4,358	27,237	37,700	"	131 95
" "	6751	42	3,873	24,206	32,650	"	114 28
" "	5008	49	4,086	25,537	35,250	"	123 38
Sept. 27	5435	24	3,806	23,787	33,200	"	116 20
" "	19567	31	4,011	25,068	31,750	"	111 13
				571,123			$2,676 19
Agreed rates from East St. Louis: 571,123 lbs. at 27½ cts.							1,570 58
Overcharge							$1,105 61
3 cts. per 100 lbs., allowance 571,123 lbs.							171 23
Due Andrew Brown							$1,276 84

18 Ohio & Mississippi, N. Y., P. & O., & Erie R'ys.
No. 550. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Nov. 13	19334	364	4,127	25,793	33,700	26	$101 10
" 11	21290	32	3,897	24,356	30,700	"	92 10
" "	7057	408	3,952	24,700	32,700	"	98 11
" "	18050	25	4,172	26,075	31,800	"	95 40
" "	537	407	3,894	24,337	33,400	"	100 20
" 13	19763	24	4,019	25,118	31,800	"	95 40
" "	2117	77	4,185	26,156	33,400	"	100 22
	7 cars.			176,535			$682 53
Agreed rate from Vincennes: 176,535 lbs. at 26 cts.							458 90
Overcharge							$223 54
3 cts. per 100 lbs., allowance 176,535 lbs.							52 96
Due Andrew Brown							$276 50

Ohio & Mississippi, N. Y., P. & O., & Erie R'ys.

No. 528. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Aug. 23....	5455	23	3,906	24,412	36,650	27½	$128 28
" 30....	5361	43	3,773	23,581	35,200	"	123 20
Sept. 10....	542	98	4,038	25,237	33,400	"	116 90
" "	4031	93	3,901	24,381	32,700	"	114 45
				97,611			$482 83
Agreed rate from East St. Louis to N. Y.: 97,611 lbs. at 27½ cts.							268 43
Overcharge							214 40
3 cts. per 100 lbs., allowance 97,611 lbs.							29 28
Due Andrew Brown							$243 68

19 Chicago & Atlantic & Erie R'ys.

No. 547. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Nov. 18	14110	702	4,169	26,056	33,450	25	$100 35
" 26....	14078	507	4,115	25,718	34,800	"	104 40
" "	15140	508	4,485	28,031	32,600	"	97 80
" 21....	15023	1064	4,346	27,162	33,300	30	116 73
" "	13046	1063	4,402	27,512	35,850	"	125 48
" 26 ..	14081	1117	4,346	27,162	36,350	"	127 23
" 29....	15119	1357	4,254	26,587	34,250	"	119 88
				188,228			$791 87
Agreed rate from Chicago: 79,805 lbs. at 25 cts.							199 51
108,423 " 30 "							325 26
							524 77
Overcharge							267 10
3 cts. per 100 lbs., allowance 188,228 lbs.							56 46
Due Andrew Brown							$323 56

20 No. 538. New York, Pennsylvania & Ohio, & Erie R'ys. (Staves.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Weight.	Agreed rate.	Freight paid.
1884.					
Sept. 10	22508	1246	34,100	20	$73 31
" "	34395	1144	39,400	"	84 71
" 17	9238	461	33,100	"	71 16
" 24	10102	771	39,700	"	85 35
" "	2411	944	38,150	"	82 02
" 27	9256	586	39,700	"	85 35
" "	10064	681	37,600	"	80 83
" 30	24	945	30,900	"	66 44
" "	9426	1091	39,500	"	84 93
Oct. 3	38383	1343	40,300	"	86 65
" 14	24383	804	35,400	"	76 12
" "	38947	6	40,150	"	86 33
" 21	22545	209	38,200	"	82 13
" "	4705	396	41,000	"	88 16
Nov. 11	10150	75	45,400	"	97 62
" 29	22552	967	49,030	"	104 00
" "	2288	966	35,100	"	91 26
Dec. 11	38251	1181	40,100	"	104 25
" 20	3699	538	39,700	"	103 22
" "	27	206	31,300	25	81 37
			758,800		$1,715 21
Agreed rate from Ashland:					
727,500 lbs. at 20 cts.				1,455 00	
31,300 " 25 "				78 25	
					1,533 25
Overcharge					181 96
3 cts. per 100 lbs., allowance 758,800 lbs.					227 64
Due Andrew Brown					$409 60

21 No. 548. New York, Pennsylvania & Ohio, & Erie R'ys. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Oct. 29	7047	78	4,259	26,618	31,000	20	$80 60
" 31	6431	131	3,767	23,546	31,600	"	82 16
" "	2430	130	4,038	25,237	29,400	"	76 44
Nov. 13	2402	5	3,692	23,075	26,570	25	81 04
" "	1134	18	4,055	25,343	31,000	"	94 55
" 21	6138	28	4,051	25,318	32,000	"	97 60
" 24	34843	27	4,173	26,706	35,000	"	106 75
	7 cars.			175,843			$619 14
Agreed rate from Cincinnati:							
75,401 lbs. at 20 cts.						150 80	
100,442 " 25 "						251 10	
							401 90
Overcharge							217 24
3 cts. per 100 lbs., allowance 175,843 lbs.							52 75
Due Andrew Brown							$269 99

Erie & Chicago & Atlantic R'ys.

No. 564½. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Dec. 20....	20007	931	4,523	28,268	34,750	30	$121 63
Agreed rate from Chicago:							
28,268 lbs. at 30 cts. per 100 lbs.							$84 80
Overcharge							36 83
3 cts. per 100 lbs., allowance 28,268 lbs.							8 48
Due Andrew Brown							$45 31

22 New York, Pennsylvania & Ohio, & Erie R'ys.

No. 539. (Poplar plank & lumber.)

Arrival at J. City.	Car. Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
Aug. 23....	39803	628	8,400	29,400	35,900	20	$93 34
" 30...	9236	1069	7,800	27,300	31,000	"	80 60
Sept. 10....	24387	79	8,700	30,450	33,500	"	87 10
" "	39820	1102	7,600	26,600	31,800	"	82 67
Oct. 21....	37905	273	8,500	29,750	36,600	"	95 16
" "	37907	17	8,400	29,400	33,700	"	87 62
Dec. 18....	9258	353	9,000	31,500	37,400	25	114 06
" 20....	9472	541	8,600	30,100	35,600	"	108 58
" 27...	39211	665	9,300	32,550	41,200	"	125 66
" "	10181	773	8,900	31,150	30,500	"	117 42
" "	10112	664	9,500	33,250	41,100	"	125 35
	11 cars.			331,450			$1,117 56
Agreed rate from Ashland:							
172,900 lbs. at 20 cts.						345 80	
158,550 " 25 "						396 37	
							742 17
Overcharge							375 39
3 cts. per 100 lbs., allowance 331,450 lbs.							99 43
Due Andrew Brown							$474 82

Lake Shore & Erie R'ys.

No. 496. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1884.							
April 12....	1703	2750	4,386	27,412	35,500	30½	$130 25
" "	1822	2709	4,120	25,750	33,600	"	117 60
" 15....	1567	1066	4,068	25,425	34,400	"	139 32
" "	1368	1759	4,271	26,443	38,950	"	157 24
" "	1987	1028	4,453	27,831	39,700	"	160 79
" "	1880	1067	4,396	27,475	34,800	"	140 93
" "	1891	2304	4,418	27,612	33,900	"	137 29
" 22....	1203	5823	4,390	27,437	34,600	"	121 10
" "	1163	5824	4,350	27,187	39,800	"	139 30
" "	1175	4682	4,355	27,218	34,400	"	120 40
	10 cars.			269,790			$1,364 22
Agreed rate from East St. Louis: 269,790 lbs. at 30½ cts							822 85
Overcharge							541 37
3 cts. per 100 lbs., allowance 269,790 lbs							80 93
Due Andrew Brown							$622 30

23 New York, Lake Erie & Western R'y Co. to Andrew Brown, Dr.

To labor unloading cars at Weehawken, N. J.:

1884.		
Oct.	48 cars	$173 25
Nov.	48 " and office repairs	171 32
Dec.	45 "	179 30
	141 cars	$523 87

Recapitulation of Schedule "A."

1884.

Bill No. 546.	Overcharge	$370 52	Allowance		871 59
554.	"	626 95	"		92 81
549.	"	961 27	"		114 60
555.	"	906 72	"		104 54
534.	"	1,105 61	"		171 23
550.	"	223 54	"		52 96
528.	"	214 40	"		29 28
547.	"	267 10	"		56 46
538.	"	181 96	"		227 64
548.	"	217 24	"		52 75
564½.	"	36 83	"		8 48
539.	"	375 39	"		99 43
496.	"	541 37	"		80 93
Total overcharge, weight and rate					$6,028 90
" allowance					1,162 70
Unloading cars at Weehawken					523 87
					$7,715 47

24 SCHEDULE "B."

Erie, N. Y., P. & O., & O. & M. R'ys.

No. 571. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Feb'y 13	1063	92	3,943	24,675	36,000	30	$115 20
" 26	1639	50	3,843	24,018	36,500	"	116 80
" 28	6071	51	3,933	24,581	40,500	"	129 60
April 30	3199	74	3,641	22,756	32,600	"	104 32
Aug. 21	2991	96	4,130	25,812	33,700	27½	92 68
" 31	299	134	4,109	25,681	35,700	"	98 18
" "	6651	123	4,055	25,343	33,200	"	91 30
" "	1125	124	4,247	26,543	34,400	"	94 60
Sept. 22	387	120	4,090	26,562	34,500	"	94 88
" "	751	88	3,952	24,700	35,000	"	96 25
" "	2339	167	3,970	24,812	33,800	"	92 95
" "	2257	104	4,209	26,306	36,000	"	99 00
" "	1073	177	4,025	25,156	38,850	"	106 84
" "	537	151	3,827	23,918	31,300	"	86 08
" 28	2949	162	3,889	24,306	32,900	"	90 48
Oct. 8	3305	193	4,040	25,250	35,250	"	96 94
" 9	1559	194	3,853	24,081	34,900	"	95 98
" 21	1503	236	3,979	24,868	35,300	"	97 08
" "	19497	285	4,291	26,818	38,500	"	134 75
" "	7543	259	4,333	27,081	37,000	"	129 50
" "	817	82	4,026	25,162	30,400	"	123 12
" "	949	101	4,005	25,031	27,900	"	113 00
" "	565	29	4,286	26,787	38,500	"	155 93
Aug. 15	3885	97	4,098	25,612	32,400	23	74 52
" "	6381	92	3,915	24,468	33,100	"	76 13
" "	2481	96	4,171	26,068	36,900	"	84 87
				656,395			$2,690 98

Agreed rate from East St. Louis:

96,030 lbs. at 30 cts.		288 09	
484,217 " 27½ "		1,331 59	
76,148 " 23 "		175 14	
			1,794 82
Overcharge			896 16
3 cts. per 100 lbs., allowance 656,395 lbs.			196 91
Due Andrew Brown			$1,093 07

25 Erie, N. Y., P. & O., C. H. & D., & O. & M. R'ys.

No. 574. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Dec. 15	133	175	3,507	21,918	32,300	27½	$130 82
" "	4885	374	3,765	23,531	33,150	"	134 26
" "	1232	143	4,125	25,781	32,000	"	129 60
" "	1629	252	3,738	23,362	30,800	"	124 74
" "	1704	253	3,477	21,731	28,300	"	114 62
" "	1605	277	3,538	22,112	30,000	"	121 50
" "	1939	146	3,814	23,837	35,750	"	144 79
" "	1424	145	3,708	23,175	30,300	"	122 72
" "	1768	144	3,853	24,081	31,000	"	125 55
" "	1794	142	3,816	23,850	30,100	"	121 90
" 22	5281	375	3,784	23,650	33,000	"	133 65
" "	321	98	3,297	20,606	26,400	"	106 92
" "	1319	376	3,424	21,400	31,600	"	127 98
" "	2351	297	3,689	23,056	29,150	"	118 06
Jan. 6	798	97	3,483	21,768	29,100	"	117 86
" "	85	321	3,653	22,831	30,000	"	121 50
" 16	1736	462	3,893	24,331	29,900	"	121 10
" "	1713	340	4,085	25,531	34,100	"	138 10
" "	1479	463	3,688	23,050	33,900	"	137 30
" "	6147	322	3,555	22,218	27,600	"	111 78
" "	1381	453	4,112	25,700	33,400	"	135 27
" "	1302	422	4,087	25,543	31,000	"	125 55
" "	4747	23	4,187	26,131	32,350	"	131 02
" 20	659	32	3,684	23,025	32,700	"	132 44
" "	237	22	3,786	23,662	31,700	"	128 39
" "	1551	33	3,876	24,225	32,800	"	132 84
" "	829	50	4,347	27,168	36,600	"	148 23
	27 cars.			637,273			$3,438 49

Agreed rate from E. St. Louis:
637,273 lbs. at 27½ cts. 1,752 50

Overcharge 1,685 99
3 cts. per 100 lbs., allowance 637,273 lbs. 191 18

Due Andrew Brown $1,877 17

26 Grand Trunk & Erie R'ys' Commercial Express Line.

No. 572. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
April 30....	1575	134	3,444	21,525	29,500	20.02	$68 38
" ".....	2497	77	3,755	23,468	34,300	"	50 83
May 27...	14788	166	4,367	27,293	32,930	"	81 40
" ".....	1303	139	3,421	21,381	31,800	"	73 71
June 30 ..	2461	194	4,404	27,525	34,500	"	70 86
" ".....	2587	189	4,239	26,493	39,000	"	80 10
" ".....	2905	191	3,927	24,543	33,450	"	68 70
" ".....	3733	192	4,157	25,981	31,120	"	63 92
" ".....	107	193	4,225	26,406	31,500	"	64 70
" ".....	19496	199	4,077	25,481	31,550	"	64 80
" ".....	968	200	3,670	22,937	33,900	"	69 63
" ".....	2329	201	3,956	24,725	31,200	"	64 08
" ".....	589	204	4,503	28,143	35,300	"	72 50
" ".....	215	203	4,032	25,200	29,250	"	60 08
" ".....	891	197	4,330	27,062	35,600	"	73 12
	.....	.....	.....	378,163	.....	.....	$1,026 81
Agreed rate from Detroit: 378,163 lbs. at 20.02 cts.....						757 08	757 08
Overcharge							269 73
3 cts. per 100 lbs., allowance 378,163 lbs...							113 44
Due Andrew Brown.....							$383 17

Erie & New York, Pennsylvania & Ohio R'ys.

No. 561. (Poplar plank.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
June 24....	8435	109	8,653	30,285	30,150	20	$68 44
July 17...	26800	94	9,230	32,305	34,250	"	77 75
" ".....	24526	93	8,063	28,220	30,500	"	69 23
	3 cars.	.....	.....	90,810	.....	.....	$215 42
Agreed rate from Cincinnati: 90,810 lbs. at 20 cts.....							181 62
Overcharge.....							33 80
3 cts. per 100 lbs., allowance 90,810 lbs.....							27 24
Due Andrew Brown.....							$61 04

27 Erie, N. Y., P. & O., & — M. R'ys.

No. 567. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
April 1....	145	120	4,070	25,462	33,700	30	$107 84
" 30....	113	216	3,639	22,743	34,300	"	109 76
" "	3801	217	3,538	22,112	31,800	"	101 76
" "	1797	47	4,321	27,006	38,300	"	122 56
Aug. 15....	167	26	3,610	22,562	27,200	"	62 56
" "	1521	24	3,882	24,262	30,050	23	69 12
" "	779	25	3,454	21,587	30,300	"	69 69
" "	4893	38	3,769	23,556	31,100	"	71 53
" 31....	4915	32	3,868	24,175	32,000	"	73 60
" "	30165	78	3,844	24,025	29,390	"	67 50
" "	4779	33	3,892	24,325	27,600	"	63 48
" "	596	34	3,942	24,637	30,700	"	70 61
" "	4999	144	4,116	25,725	30,200	"	69 46
" "	19872	112	4,103	25,643	29,900	27½	82 23
" "	1707	138	4,258	26,612	32,200	"	88 55
" "	1227	111	3,841	24,006	28,125	"	77 34
" "	1181	129	3,830	23,937	29,275	"	80 50
" "	1915	122	3,729	23,306	30,900	"	84 98
Sept. 22....	4893	111	3,982	24,887	32,850	"	90 34
" "	447	5	3,713	23,206	27,000	"	74 25
" "	385	112	3,949	24,681	32,100	"	88 28
" "	383	62	3,714	23,212	28,500	"	78 38
" "	2791	285	4,090	25,562	32,100	"	88 28
" "	389	142	3,784	23,650	32,000	"	88 00
" "	2721	32	4,097	25,606	32,400	"	89 10
" "	1971	16	3,690	23,062	28,700	"	78 93
" "	4640	108	3,771	23,568	31,300	"	86 08
Oct. 8....	905	192	3,206	20,037	28,100	"	77 28
" "	4884	210	3,781	23,631	28,500	"	78 38
" 16....	1597	34	3,667	22,981	29,400	"	80 85
" "	283	222	4,003	25,018	30,900	"	84 98
" "	6707	26	3,715	23,218	28,100	"	70 27
" "	3235	25	3,819	23,868	30,500	"	76 25
" 21....	1205	230	4,029	25,181	31,250	"	85 94
" "	7115	223	4,117	25,731	30,800	"	84 70
" 31....	737	105	4,570	28,562	37,000	"	143 10
Nov. 5....	1083	180	4,042	25,262	30,500	"	106 75
" "	159	112	3,674	22,962	29,000	"	101 50
" "	2385	133	4,353	27,206	32,970	"	115 40
" 17....	49	185	4,046	25,287	32,800	"	115 80
" "	7117	179	4,161	26,006	31,550	"	110 43
" 21....	341	64	3,897	24,356	31,400	"	109 90
	42 cars.			1,022,421			$3,676 04

Agreed rate from E. St. Louis:

97,323 lbs. at 30 cts.		291 96	
214,854 " 23 "		494 16	
710,244 " 27½ "		1,953 17	
			2,739 29
Overcharge			936 75
3 cts. per 100 lbs., allowance 1,022,421 lbs.			306 72
Due Andrew Brown			$1,243 47

28 Erie & Chicago, Rock Island & Pacific R'ys.

No. 568. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Jan. 23 ...	14,164	7	4,057	25,356	34,140	48½	$184 36
Feb. 13....	15,156	13	4,340	27,125	31,500	"	168 04
April 1....	15,029	7	4,397	27,481	31,900	"	172 26
" 7....	14,052	8	4,260	26,625	33,300	"	179 82
" 30....	15,046	9	4,053	25,331	33,200	"	179 28
" "	15,047	1	4,264	26,650	33,900	"	183 06
" "	14,088	3	4,443	27,768	33,700	"	181 98
" "	15,105	2	4,359	27,243	32,200	"	173 88
May 27....	13,867	165	4,321	27,006	30,000	43½	156 00
" "	13,352	19	4,689	29,306	36,000	"	187 20
" "	14,152	37	4,279	26,743	31,250	"	168 76
" "	14,185	1	4,586	28,662	34,600	"	179 92
" "	13,172	38	4,281	26,756	31,600	"	170 64
June 30....	13,187	23	4,902	30,637	36,700	"	190 84
	.....	.....	.....	382,689	.....	.....	$2,476 04

Agreed rate from Kansas City and Leavenworth:

213,579 lbs. at 48½ cts.....	1,035 85	
169,110 " 43½ "	735 62	
		1,771 47
Overcharge		704 57
3 cts. per 100 lbs., allowance 382,689 lbs.....		114 80
Due Andrew Brown		$819 37

29 Chicago & Atlantic & Erie R'ys.

No. 566. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Aug. 15....	15158	49	4,169	26,056	31,550	15.65	$86 38
" "	2441	1211	4,965	31,031	36,000	"	56 34
" "	1921	943	4,258	26,612	33,150	"	51 88
" "	3857	942	4,349	27,181	32,450	"	50 78
" "	546	941	4,219	26,368	31,500	"	49 30
" "	14029	630	4,418	27,612	33,650	"	52 66
" "	14164	406	4,231	26,443	32,900	"	51 49
" "	14055	50	4,442	27,762	35,292	"	96 63
	8 cars.	.....	.....	219,065	.....	.....	$495 44

Agreed rate from Chicago:

219,065 lbs. at 15.65 cts.....	342 83
Overcharge.....	152 63
3 cts. per 100 lbs., allowance 219,065 lbs.	65 71
Due Andrew Brown	$218 34

Erie, N. Y., P. & O., & O. & M. R'ys.

No. 569. (Walnut logs.)

Arrival at J. City.	Car. Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Sept. 22....	19573	114	4,036	25,225	33,000	27½	$890 75
" "	5347	121	4,143	25,893	30,000	"	82 50
" "	19651	122	4,321	27,006	34,800	"	95 70
" "	30256	172	4,600	28,750	35,600	"	97 90
" "	19405	63	4,104	25,650	32,000	"	88 00
" "	19536	65	4,697	29,356	37,100	"	102 03
" 26....	19322	183	3,735	23,343	31,000	"	85 25
" 30....	19750	170	4,034	25,212	36,000	"	99 00
" 24....	19721	64	4,794	29,962	38,000	"	104 50
				240,397			$845 63
Agreed rate from East St. Louis: 240,397 lbs. at 27½ cts							661 09
Overcharge							184 54
3 cts. per 100 lbs., allowance 240,397 lbs							72 11
Due Andrew Brown							$256 65

30 Erie, N. Y., P. & O., & O. & M. R'ys.

No. 573. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Aug. 21....	1807	95	4,193	26,206	26,700	27½	$873 43
" "	.....	93	4,135	29,843	21,500	"	59 13
" "	141	94	3,604	22,565	20,000	"	55 00
" 31....	1251	77	.....	.....	30,300	"	69 69
	3 cars.			78,614			$257 25
Agreed rate from East St. Louis: 78,614 lbs. at 27½							216 18
Overcharge							41 07
3 cts. per 100 lbs., allowance 73,614 lbs.							23 58
Due Andrew Brown							$64 65

NOTE.—These logs were originally loaded upon three cars; they were wrecked and reloaded upon four cars, viz: Nos. 1199, 34940, 2005, 5311.

Erie, New York, Pennsylvania & Ohio R'ys.

No. 569. (Poplar planks and b'ds.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
June 29...	39497	1195	8,603	30,110	32,600	20	$84 76
" "...	9391	339	7,200	25,200	26,100	"	67 86
" 30...	4743	285	8,200	28,700	30,600	"	79 55
" "...	22711	336	8,908	31,174	33,900	"	88 14
" "...	22551	190	7,800	27,300	28,100	"	73 06
" "...	37807	7	8,500	29,750	31,000	"	80 60
" "...	2132	9	8,710	30,485	31,900	"	82 94
" "...	38187	11	6,850	23,975	25,200	"	65 52
" "...	39624	89	8,600	30,100	32,960	"	85 54
" "...	38194	90	7,782	27,237	30,000	"	78 00
Aug. 15...	38950	975	7,400	25,900	27,400	"	71 24
	11 cars.			309,931			$857 21
Agreed rate from Ashland: 309,931 lbs. at 20 cts							619 86
Overcharge							237 35
3 cts. per 100 lbs., allowance 309,931 lbs.							92 97
Due Andrew Brown							$330 32

31 New York, Pennsylvania & Ohio, & Erie R'ys.

No. 551. (Oak plank and lumber.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
April 25....	2460	919	6,000	30,000	40,000	20	$104 05
" "	7042	782	6,100	30,500	40,800	"	106 90
" "	6009	783	5,700	28,500	36,900	"	95 46
" "	7320	726	5,600	28,000	34,400	"	89 24
" "	1769	727	5,700	28,500	35,100	"	91 13
" "	7251	604	5,500	27,500	33,900	"	88 92
" "	7393	646	5,200	26,000	31,500	"	81 15
" "	7494	920	5,400	27,000	34,300	"	89 80
May 1....	2495	1051	5,800	29,000	33,800	"	87 15
" "	38985	1138	4,300	21,500	24,300	"	63 16
" 4....	3547	1191	6,300	25,200	28,500	"	74 64
" "	3812	986	6,200	31,000	36,000	"	93 10
" "	50004	1052	6,000	30,000	38,900	"	101 91
" "	39811	1139	5,500	27,500	31,900	"	82 31
" "	22681	1190	5,200	26,000	30,500	"	79 72
" "	2455	1192	5,450	27,250	30,300	"	78 44
" "	39697	1396	4,500	22,500	24,000	"	62 02
" 6....	8894	1193	5,100	25,500	30,800	"	80 45
" "	7405	1397	5,600	28,000	34,000	"	88 65
" "	7406	1395	5,800	29,000	36,400	"	94 18
" "	7178	1434	5,100	25,500	31,200	"	81 70
" 12....	7244	287	6,200	31,000	37,600	"	97 75
" "	34468	192	5,400	27,000	32,200	"	83 05
" "	51	8	5,000	25,000	30,000	"	78 08
" "	7116	87	5,200	26,000	33,200	"	86 34
" "	13489	6	5,500	27,500	37,100	"	96 48
" "	34457	91	5,000	25,000	30,000	"	78 00
" 19....	34677	543	5,400	27,000	33,700	"	87 62
" "	7011	754	5,400	27,000	33,500	"	87 10
" 27....	34704	948	5,400	27,000	33,300	"	86 52
" "	4193	947	5,800	29,000	35,200	"	91 50
" "	34530	1003	5,400	27,000	33,800	"	87 82
	32 cars.			872,450			$2,774 34

Agreed rate from Ashland:	
872,450 lbs. at 20 cts.	1,744 90
Overcharge	$1,029 44
3 cts. per 100 lbs., allowance 872,450 lbs.	261 73
Due Andrew Brown	$1,291 17

32 Erie & New York, Pennsylvania & Ohio R'ys.

No. 559. (Oak plank.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
June 3....	2425	1002	6,420	32,100	35,000	20	$91 00
" "	2344	1148	6,071	30,355	31,000	"	80 60
" 11....	34578	348	6,058	30,290	32,000	"	83 20
" "	34034	154	6,240	31,200	32,800	"	85 27
" 17....	7391	536	6,170	30,850	33,000	"	85 80
" 24....	6275	692	6,579	32,895	33,000	"	85 80
" 29....	7401	1158	5,900	29,500	29,800	"	77 47
" "	7319	1194	6,190	30,950	33,400	"	86 84
" 30....	34876	756	5,500	27,500	38,900	"	75 16
" "	34830	386	6,900	34,500	36,500	"	94 90
" "	34544	1279	5,830	29,150	30,900	"	80 34
" "	7256	541	6,400	32,000	33,000	"	85 80
" "	34733	542	5,900	29,500	29,200	"	75 92
" "	2359	755	5,900	29,500	31,800	"	82 67
Aug. 15....	34941	1454	5,400	27,000	28,100	"	73 05
" "	1417	1453	7,200	36,000	39,000	"	101 40
" "	39478	1638	3,750	28,750	29,600	"	76 96
" "	2290	690	5,829	29,145	31,700	"	82 43
	18 cars.	... ...		551,185	.....	.....	$1,504 61

Agreed rate from Ashland: 551,185 lbs. at 20 cts.....	1,102 37
Overcharge.....	402 24
3 cts. per 100 lbs., allowance 551,185 lbs.....	165 35
Due Andrew Brown.....	$567 59

33 Erie, New York, Pennsylvania & Ohio R'ys. 34

No. 558. (Staves.)

Arrived at J. City.	Car Nos.	Way-bill Nos.	Weight.	Agreed rate.	Freight paid.
1885.					
June 13	27546	1278	39,200	.20	$84 28
" "	3593	347	46,900	"	100 84
" "	10043	693	30,700	"	66 00
July 3	10094	1196	46,500	"	99 98
Aug. 1	39114	699	44,300	"	95 24
" 10	10164	1626	44,300	"	95 25
" 12	3784	1692	46,200	"	99 33
" 18	10173	365	41,400	"	89 02
" "	39462	184	41,100	"	88 36
" 27	22592	875	35,000	"	75 46
" 31	10084	930	43,700	"	93 95
" "	3546	1085	36,150	"	77 73
Sept. 8	39003	1531	42,300	"	90 95
" "	768	1378	35,000	"	75 90
" 9	9289	1086	39,300	"	84 50
" 12	9430	42	36,400	"	78 27
" "	39666	44	39,800	"	85 57
" 17	3857	388	39,600	"	85 14
" "	39554	452	39,000	"	83 85
" 24	39766	504	39,000	"	83 85
" "	9294	338	37,200	"	79 98
" 26	39829	847	37,700	"	81 05
" 30	9334	982	36,900	"	79 34
" "	9366	1247	37,800	"	81 27
Oct. 1	10186	587	36,900	"	79 34
" 5	2708	1915	32,000	"	68 80
" 9	9007	150	35,400	"	76 12
" "	9589	853	36,000	"	77 40
" 21	9127	362	26,600	"	57 18
Nov. 5	9121	735	32,400	"	69 67
" 6	80	1070	28,950	"	62 25
	31 cars.	.....	1,183,700	.....	$2,545 87

Agreed rate from Ashland:
1,183,700 lbs. at 20 cts. 2,367 40

Overcharge 178 47
3 cts. per 100 lbs., allowance 1,183,700 lbs. 355 11

Due Andrew Brown $533 58

34 New York, Pennsylvania & Ohio, & Erie R'ys.

No. 553. (Staves.)

Arrived at J. City.	Car Nos.	Way-bill Nos.	Weight.	Agreed rate.	Freight paid.
1885.					
May 4	3687	542	48,200	.20	$103 63
" "	3663	543	46,300	"	99 55
" 15	9147	1140	40,700	"	87 50
" "	22583	761	43,400	"	93 31
" 21	29677	387	38,200	"	82 13
	5 cars.		216,800		$466 12
Agreed rate from Ashland: 216,800 lbs. at 20 cts					433 60
Overcharge					32 57
3 cts. per 100 lbs., allowance 216,300 lbs					65 04
Due Andrew Brown					$97 56

New York, Pennsylvania & Ohio, & Erie R'ys.

No. 552. (Poplar plank.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
May 9	2608	88	8,200	28,700	31,600	.20	$82 16
" "	39180	419	9,500	33,250	40,300	"	104 77
" 13	3468	288	9,000	31,500	34,400	"	89 44
" "	3423	286	7,500	26,250	28,200	"	73 32
" 19	39175	539	7,000	24,500	27,000	"	70 20
" 27	37709	1004	8,500	29,750	33,800	"	87 87
	6 cars.			173,950			$507 76
Agreed rate from Ashland: 173,950 lbs. at 20 cts							347 90
Overcharge							159 86
3 cts. per 100 lbs., allowance 173,950 lbs.							52 18
Due Andrew Brown							$212 04

35 Erie & New York, Pennsylvania & Ohio R'ys.

No. 562. (Ash logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Sept. 15...	7140	557	4,192	26,200	24,000	.17	$40 80
" 22...	7266	9	4,886	30,537	33,000	.18[16]	59 93
" "...	7191	25	3,051	19,068	29,500	"	53 57
	3 cars.	.....	.....	75,805	.....	.....	$154 30
Agreed rate from Mansfield, Ohio:							
26,200 lbs. at 17 cts						44 54	
49,605 " " 18[16] cts.....						90 08	
							134 62
Overcharge.....							19 68
3 cts. per 100 lbs., allowance 75,805 lbs.....							22 74
Due Andrew Brown.....							$42 42

Erie, New York, Pennsylvania & Ohio, & C. H. & D. R'ys.

No. 564. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
June 30...	7220	770	4,558	28,487	33,500	.20	$87 10
" "...	7399	287	3,504	21,900	27,500	"	71 50
" "...	7247	286	4,021	25,131	29,500	"	76 70
" "...	34450	288	3,865	24,156	31,900	"	82 94
Aug. 10...	7293	116	4,577	28,606	33,450	"	71 92
" 11...	7027	115	4,478	27,987	33,200	"	71 38
" 15...	7211	736	3,498	21,862	26,050	"	52 10
" "...	7252	246	4,004	25,025	30,800	"	61 60
" 21...	7249	324	3,806	23,787	31,000	"	62 00
" 22...	470	474	3,834	23,962	29,200	"	58 40
" 24...	34460	347	4,469	27,931	38,850	"	89 35
Sept. 30...	34949	346	5,042	31,512	34,000	"	78 20
" "...	1622	348	4,496	28,100	26,200	"	60 26
	13 cars.	.....	.....	338,446	.....	.....	$923 45
Agreed rate from Cincinnati and Dayton:							
338,446 lbs. at 20 cts.....							676 89
Overcharge.....							246 56
3 cts. per 100 lbs., allowance 338,446 lbs.....							101 53
Due Andrew Brown.....							$348 09

36 Erie & Chicago & Atlantic R'ys.

No. 565. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
June 30...	15144	594	4,415	27,593	32,850	20	$89 94
" " ...	14084	689	4,470	27,937	32,000	"	87 62
" " ...	15089	393	4,304	26,900	31,800	"	87 07
" " ...	15157	929	4,476	27,975	33,400	"	100 20
Aug. 11...	6956	838	4,401	27,506	33,800	"	101 40
" " ...	9075	604	4,527	28,293	35,700	"	107 10
" 31...	6323	1085	4,728	29,550	34,200	"	102 60
" " ...	7	1148	4,553	28,456	35,400	"	106 20
Sept. 22...	7408	132	5,321	33,256	44,200	"	132 60
Jan'y 19...	9249	40	4,247	26,543	33,500	"	107 20
" 20...	9417	1464	4,168	26,050	34,000	"	108 80
" " ...	7459	41	3,867	24,168	32,400	"	103 68
Feb'y 17...	5949	217	4,136	25,850	28,400	"	76 68
" " ...	22	218	4,353	27,206	29,900	"	80 73
" 26...	17078	1244	4,274	26,712	33,800	"	91 26
" " ...	17068	1243	4,310	26,937	36,000	"	97 20
	16 cars.			440,932			$1,580 28
Agreed rate from Chicago: 440,932 lbs. at 20 cts.							881 86
Overcharge							698 42
3 cts. per 100 lbs., allowance 440,932 lbs							132 28
Due Andrew Brown							$830 70

Erie, N. Y., P. & O., & C. H. & D. R'ys.

No. 570. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Nov. 21....	6695	32	3,680	23,000	24,000	.20	$62 40
" "	6231	31	3,803	23,768	24,000	"	62 40
" "	4326	877	4,201	26,256	31,500	.25	78 75
" "	34726	522	4,401	27,500	36,500	.24½	89 43
	4 cars.			100,524			$292 98
Agreed rate from Cincinnati and Dayton:							
46,768 lbs. at 20 cts.						93 53	
26,256 " 25 "						65 64	
27,560 " 24½ "						67 37	
							226 54
Overcharge							66 44
3 cts. per 100 lbs., allowance 100,524 lbs							30 15
Due Andrew Brown							$96 59

37 Erie & New York, Pennsylvania & Ohio R'ys.

No. 563. (Walnut logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
Aug. 10...	517	1087	3,867	25,135	29,000	.28	$81 21
Agreed rate from Cairo: 25,135 lbs. at 28 cts							70 37
Overcharge							10 84
3 cts. per 100 lbs., allowance 25,135 lbs							7 54
Due Andrew Brown							$18 38

New York, Pennsylvania & Ohio, & Erie R'ys.

No. 545. (Ash logs.)

Arrival at J. City.	Car Nos.	Way-bill Nos.	Feet.	Shippers' weight.	R. R. weight.	Agreed rate.	Freight paid.
1885.							
M'ch 20....	7007	32	3,816	23,850	30,200	.16⅝	$50 28
" "	7005	31	4,028	25,175	31,400	"	52 28
" 25....	7169	33	4,230	26,437	31,700	"	52 78
" "	7301	30	3,803	23,768	28,000	"	46 62
April 8....	4326	51	3,706	23,162	29,500	"	49 12
" "	7135	54	3,448	21,550	28,800	"	47 95
				143,942			$299 03
Agreed rate from Mansfield, Ohio: 143,942 lbs. at .16⅝							239 66
Overcharge							59 37
3 cts. per 100 lbs., allowance 143,942 lbs							43 18
Due Andrew Brown							$102 55

38 New York, Lake Erie & Western R'y Co. to Andrew Brown, Dr.

To unloading cars at Weehawken, N. J.:

1885.			
April. 33 cars	$111 24		
May. 51 "	165 10		
June. 31 "	85 12		
		$361 46	
July. 23 "	40 12		
Aug't. 29 "	70 67		
Sept. 47 "	169 68		
		280 47	
Oct. 29 "	79 37		
Nov. 15 "	24 17		
Dec. 13 "	13 86		
1886.			
Jan'y. 14 "	14 87		
		132 27	
		$774 20	

Recapitulation of Schedule "B."

1885.

Bill No. 571.	Overcharges....	$896 16	Allowance.....	$196 91
574.	"	1,685 99	"	191 18
572.	"	269 73	"	113 44
561.	"	33 80	"	27 24
567.	"	936 75	"	306 72
568.	"	704 57	"	114 80
566.	"	152 63	"	65 71
569.	"	184 54	"	72 11
573.	"	41 07	"	23 58
560.	"	237 35	"	92 97
551.	"	1,029 44	"	261 73
559.	"	402 24	"	165 35
558.	"	178 47	"	355 11
553.	"	32 57	"	65 04
552.	"	159 86	"	52 18
562.	"	19 68	"	22 74
564.	"	246 56	"	101 53
565.	"	698 42	"	132 28
570.	"	66 44	"	30 15
563.	"	10 84	"	7 54
545.	"	59 37	"	43 18
	Total overcharge, weight and rate.....			$8,046 58
	" allowance.....			2,441 49
	Unloading cars at Weehawken.....			774 20
				$11,262 27

(Endorsed:) U. S. circuit court, S. dist. of New York. Andrew Brown *vs.* The New York, Lake Erie & Western Railroad Company. Complaint. C. L. Atterbury, pl'ff's attorney, 58 William St., New York city. U. S. marshal's office, S. D. N. Y. Received Jan. 10, 1887. I hereby certify that on the 10th day of January, 1887, at the city of New York, in my district, I personally served the within complaint upon the within-named The New York, Lake Erie & Western Railroad Company by exhibiting to Augustus R. Macdonough, secretary of said company, the within original and at the same time leaving with him a copy thereof, dated January 10th, 1887. M. T. McMahon, United States marshal, southern district of New York, by George H. Holmes, deputy. U. S. circuit court. Filed Jan. 11, 1887. Timothy Griffith, clerk.

39 Circuit Court of the United States for the Southern District of New York.

ANDREW BROWN
ag'st
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

The defendant above named, answering the complaint of the plaintiff herein:

I. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the first paragraph of the complaint.

II. Denies that it has any knowledge or information sufficient

to form a belief of the allegations contained in the sixth, seventh and eighth paragraphs of the complaint.

III. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the ninth paragraph of the complaint, except that it admits that during the year 1884 the plaintiff shipped, or caused to be shipped, certain logs, timber, planks, staves and other freights over the defendant's railroad, by way of Jersey City.

IV. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the tenth paragraph of the complaint, except that defendant on its information and belief admits that the plaintiff paid in full to the defendant company for all of his shipments during said year of 1884 the
40 tariff rates upon the same as specified in the bills of lading thereof computed upon the weights mentioned therein.

V. Admits that it did rebate and pay to the plaintiff from time to time various sums of money; but on its information and belief denies that such rebates or payments were made in pursuance of the said alleged agreement, or that plaintiff became entitled thereto thereunder, as alleged in the eleventh paragraph of the complaint. And the defendant admits that in the latter part of said year 1884 it refused to pay to the plaintiff the alleged rebates and amounts to which he claimed to be entitled under the terms of said alleged agreements upon his shipments during the said year. But the defendant on its information and belief denies that the plaintiff was entitled to such payments by reason of said alleged agreement or otherwise. And the defendant denies that there now remains due and unpaid to the plaintiff under said alleged agreement or otherwise, upon his said shipments during said year 1884, or any other shipments, the amounts set forth in the eleventh paragraph of the complaint, or any amounts whatever, on account of the matters therein alleged, or any other matter or thing soever.

Second.

The defendant, answering the second alleged cause of action set forth in the complaint, hereby adopts and realleges the allegations, admissions and denials of the preceding defense to the first alleged cause of action as to the allegations contained in the first, second, third, fourth, fifth, sixth, seventh and eighth paragraphs of the complaint; and on its information and belief denies each and every allegation contained in the twelfth paragraph thereof.

II. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the thirteenth
41 paragraph of the complaint, except that on its information and belief it admits that during the year 1885 the plaintiff shipped, or caused to be shipped, certain logs, timber, planks, staves and other freights over the defendant's railroad, by way of Jersey City.

III. Denies that it has any knowledge or information sufficient to form a belief of the allegations contained in the fourteenth para-

graph of the complaint, except that it admits that the plaintiff paid to the defendant company for all of his said shipments during the year 1885 the tariff rates upon the same as specified in the bills of lading thereof, and computed upon the weights mentioned therein.

IV. Admits that it has refused to pay to the plaintiff the alleged rebates and amounts to which he claimed to be entitled under the terms of said alleged agreement upon his shipments during said year 1885; but on its information and belief defendant denies that the plaintiff ever became entitled to such rebates or amounts; and on its information and belief defendant denies that the amounts specified in the fifteenth paragraph of the complaint, or any amounts whatever, are due to the plaintiff on account of said alleged agreement or otherwise, for the year 1885, or any other time, on account of the matters therein alleged, or any other matter or thing whatsoever.

Third.

For a second, separate and distinct answer and defense to the first and second alleged causes of action set forth in the complaint, the defendant repeats the allegations, admissions and denials in the preceding first defenses contained, and on its information and belief alleges that the pretended agreement and the alleged renewals or continuations thereof set forth in the complaint, if the same were attempted to be made by any person on behalf of this defend-
42 ant, were so attempted to be made without the authority of this defendant or its board of directors, and were not and are not the corporate act or acts of this defendant, nor binding upon it.

Fourth.

For a third, separate and distinct answer and defense to the alleged causes of action set forth in the complaint, the defendant repeats the allegations, admissions and denials in the preceding defenses contained, and alleges that the pretended agreement and the alleged renewals or continuations thereof set forth in the complaint, if the same were attempted to be made as therein alleged, were contrary to law, and the same were and are illegal and void.

Fifth.

For a fourth, separate and distinct answer and defense to the alleged causes of action set forth in the complaint, the defendant repeats the allegations, admissions and denials in the preceding defenses contained, and alleges that the preten led agreement and the alleged renewals or continuation thereof set forth in the complaint, if the same were attempted to be made as therein alleged, were made under a mistake of fact and without consideration to the defendant herein.

Wherefore, the defendant demands judgment that the complaint be dismissed, with costs.

J. A. BUCHANAN &
CHARLES STEELE,
Defendant's Attorneys, 21 Cortlandt Street, N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

Augustus R. Macdonough, being duly sworn, says:

That he is the secretary of The New York, Lake Erie and Western Railroad Company, the defendant named in the foregoing
43 answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

AUGUSTUS R. MACDONOUGH.

Sworn to before me this 19th day of February, 1887.

[SEAL.] GEO. E. GRANT,
Notary Public, N. Y. City and Co.

(Endorsed:) U. S. circuit court for the southern district of New York. Andrew Brown ag'st The New York, Lake Erie & Western Railroad Company. Answer of J. A. Buchanan and Charles Steele, defendant's attorneys, 21 Cortlandt St., N. Y. U. S. circuit court. Filed Feb. 21, 1887. Timothy Griffith, clerk.

At the April term of the United States circuit court for the southern district of New York, held in New York city, at the post office, on April 24, 1888.

Present: Hon. William J. Wallace, circuit judge.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

On reading and filing the annexed stipulation, it is—

Ordered that the above-entitled action be referred to Hamilton Cole, Esq., as sole referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such referee with the same force and effect as upon a hearing and decision of the court.

44 And it is further ordered that the said referee shall make special findings of fact herein, and that said findings when adopted by the court shall have the same force and effect as and shall be deemed findings of the court.

It is further ordered that this action and the issues therein may be tried and determined by the court without the intervention of a jury.

It is further ordered that judgment shall not be entered herein until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon.

It is further ordered that the referee's fees be taxed as costs herein.

(Signed) WM. J. WALLACE.

Form approved.

BUCHANAN AND STEELE,
Def't's Attorneys, 21 Cortlandt St., N. Y.

C. L. ATTERBURY, *Att'y for Pl'ff.*

U. S. Circuit Court for the Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed that the above-entitled action be referred to Hamilton Cole, Esq., as sole referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such referee, with the same force and effect as upon a hearing and decision of the court.

45 And it is further stipulated and agreed that the said referee shall make special findings of fact herein, and that said findings when adopted by the court shall have the same force and effect as and shall be deemed findings of the court.

It is further stipulated and agreed by and between the parties hereto, that this action and the issues therein may be tried and determined by the court without the intervention of a jury, and a jury is hereby waived.

It is further stipulated and agreed that judgment shall not be entered herein until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon.

It is further stipulated and agreed that the referee's fees shall be taxed as costs herein.

Dated New York, April 23, 1888.

C. L. ATTERBURY,
Att'y for Plaintiff.

BUCHANAN & STEELE,
Defendant's Attorneys, 21 *Cortlandt St., N. Y.*

(Endorsed:) U. S. circuit court, S. D. of N. Y. Andrew Brown *vs.* The New York, Lake Erie & Western R. R. Co. Consent and order. U. S. circuit court. Filed Apr. 24, 1888. Timothy Griffith, clerk.

United States Circuit Court, Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

I, the undersigned, to whom was referred, by an order of this court bearing date April 24, 1888, the above-entitled action

46 to hear and determine all the issues therein, do respectfully report:

That I have been attended upon the hearings herein by the parties hereto and their counsel, and first having been duly sworn, I proceeded to take the testimony and proofs offered, and having considered the same and the argument of counsel thereupon, I do make as

Special Findings of Fact—

First. That the plaintiff is an alien and subject of the Queen of the United Kingdom of Great Britain and Ireland, and resident in the State of New York.

Second. That the defendant The New York, Lake Erie and Western Railroad Company is, and at all the times during the periods mentioned in the complaint herein was, a corporation created and existing under and by virtue of the laws of the State of New York, and is a citizen of said State.

Third. That said defendant is, and at all the times in said complaint mentioned was, engaged in the operation of lines of railroad, extending, amongst others, from and near the city of Jersey City, in the vicinity of the city of New York, in the State of New York, to the cities of Buffalo and Dunkirk, in said State, and to the city of Dayton, in the State of Ohio, and in the transportation of freight and merchandise for hire over the same.

Fourth. That at said Buffalo, Dunkirk and Dayton, as well as at other places upon the lines of railroad so as aforesaid operated by it, connections were at all times made with railroad lines extending directly or through the medium of other railroads to St. Louis, Chicago and other points and places in the West.

47 Fifth. That by means of such railroad connections and under and in pursuance of arrangements had therefor between the said defendant and the various railroad companies operating the lines of railroad so connecting at all the times mentioned in said complaint, freights delivered at Western points as mentioned were transported without breaking bulk or transfer over the railroad connections of the said defendant and the railroads operated by it as aforesaid, to the city of New York and to the city of Jersey City, and there delivered to consignee or as directed, upon through bills of lading and at rates of freight therein specified.

Sixth. That the plaintiff for many years before and during all the times mentioned in the complaint was a large shipper of logs, timbers, planks, staves, and other freight from the said cities of Chicago, St. Louis, and other points in the West, reached by the connections of the defendant as aforesaid, intended for transportation to the city of Jersey City, in the vicinity of New York, and thence by water to ports and places in England and upon the continent of Europe.

That for several years immediately preceding the year 1882, the shipments of the plaintiff above mentioned were made exclusively over the railroad of the defendant company in consideration of rates and facilities thereto granted him, and that he was so induced so to ship by reason of such facilities and rates offered and given him by the defendant company, through its officers and agents thereto authorized.

Seventh. That in the beginning of the year 1882, the defendant company desiring to secure the freights of the plaintiff above mentioned for transportation over its lines of railroad as aforesaid, and

in consideration that the plaintiff, so far as the defendant could and would furnish facilities therefor, would ship over its said
48 lines of railroad and connections during the year 1882 all the logs, timbers, planks, staves and other freights controlled by him intended for transportation from Western points as aforesaid, by way of the city of Jersey City, to places and ports in England and upon the continent of Europe, agreed with the plaintiff, for and during the year 1882, with respect to the shipment of his freights during such year, as follows:

A. That it would make such rates to the plaintiff upon his said freights from the said cities of St. Louis, Chicago and from other points in the West, where the same were delivered for transportation as aforesaid, to the city of Jersey City and its vicinity, as were from time to time agreed upon between the plaintiff and defendant, and which rates should be at all times as low as those given to any other shippers of like freights, whether over the defendant's roads or those of its competitors, and that in the event the rates so agreed upon should be less than the published tariff rates for the time then being, or less than the rates specified in the bill of lading issued to him by such Western connections for transportation as aforesaid, that then, and in every such case, it would rebate and repay to the plaintiff the excess of such tariff rate or such rate specified in the bill of lading over the rate so from time to time agreed upon between them to the extent the plaintiff should have paid the same.

B. That such agreed rates should be computed upon shippers' weight, according to the following measurements, to wit:

On walnut logs, at 6¼ pounds per foot;

On oak planks, at 5 pounds per foot;

On poplar planks, at 3½ pounds per foot;

which weight so ascertained was to stand in lieu of the ordinary railroad weight, as specified in the bills of lading therefor, and that it would rebate and repay to the plaintiff any excess of rate
49 computed upon the railroad weight over the amount payable by him upon shippers' weight, as above specified, to the extent the plaintiff should have paid the same.

C. That it would rebate and repay to the plaintiff the sum of three cents per hundred pounds, computed upon shippers' weight as aforesaid, upon all freights transported by it for him to Jersey City and vicinity as aforesaid.

D. That it would repay to the plaintiff the actual cost and expense incurred by him in and about the unloading of said freights from the cars in which the same arrived at Weehawken, in the vicinity of the city of Jersey City aforesaid.

Eighth. That during the year 1882 the agreement so made was duly observed and performed by both the plaintiff and defendant; that it was renewed for the year 1883, and during said year was in like manner duly observed and performed by both parties. That during the year 1882 the shipments of the plaintiff amounted to 13,803 tons, and that he paid to the defendant company for freights thereon from point of shipment the sum of $75,427.87, and that during the year 1883 the plaintiff's shipments amounted to 13,154

tons, and that the plaintiff paid to the defendant company for freights thereon from point of shipment, the sum of $93,704.82.

That the freights so paid by him during the years mentioned were computed upon the rates specified in the bills of lading therefor and upon the weights therein mentioned.

That during each of said years 1882 and 1883, in accordance with its agreement, the defendant company rebated and repaid to the plaintiff all excess of freights computed at rates specified in the bills of lading and upon weights mentioned therein, over the amounts thereof computed at the agreed rates upon shippers' weights to the extent the plaintiff paid such excess, and as well paid to
50 the plaintiff the sum of three cents per hundred pounds, computed on shippers' weights, upon his freights transported to Jersey City during said years, and the actual cost incurred by him in the unloading of his freights from the cars in which the same arrived at Weehawken, in the vicinity of Jersey City aforesaid.

Ninth. That in the beginning of the year 1884 the said agreement was renewed for and during that year; and under and in pursuance thereof, the plaintiff shipped and caused to be shipped staves and other freights and being all of such freights controlled by him and intended for transportation from Western points as aforesaid, by way of said city of Jersey City, to ports and places in England and upon the continent of Europe, so far as the defendant company furnished facilities therefor, and at rates which were from time to time agreed upon between them.

That the aggregate amount of freights so shipped by the plaintiff during said year 1884 amounted to 10,758 tons, upon which the plaintiff paid to the defendant company for the freight thereon from points of shipment the sum of $83,639.51.

Tenth. That the plaintiff paid in full to the defendant company and as required by it for all of his shipments, during the year 1884, tariff rates upon the same as specified in the bills of lading therefor, and as computed upon railroad weights therein mentioned, and in addition expended money in and about the unloading of his freights at Weehawken aforesaid. That the rates so paid by him were in excess of the rates agreed upon from time to time between the plaintiff and the defendant company, and the weights upon which the same were computed were in excess of the shippers' weights upon which it was agreed such rates should be computed.

Eleventh. That in pursuance of said agreement the said
51 defendant did rebate and pay to the plaintiff from time to time various sums of money, to which he became entitled under said agreement, for and by reason of his shipments during the year 1884, as aforesaid, and continued so to do until the latter part of the said year, when the defendant company refused to further keep and perform its agreement, and did thereafter neglect and refuse to pay to the plaintiff the rebates and amounts to which he was then and thereafter became entitled under the terms of said agreement upon his shipments during the year 1884. That there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1884, as follows:

For rebates on account of freights and weights as aforesaid, and as stated and set forth in Exhibit A attached to the complaint, the sum of six thousand and twenty-eight $\frac{90}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weight, upon plaintiff's freights transported to Jersey City and vicinity as aforesaid, as set forth in Exhibit A aforesaid, the sum of eleven hundred and sixty-two $\frac{70}{100}$ dollars.

For actual costs and expenses incurred by plaintiff in unloading his freights at Weehawken, as set forth in Exhibit A aforesaid, the sum of five hundred and twenty-three $\frac{87}{100}$ dollars.

The plaintiff on or before the first day of March, 1885, presented to the defendant company an account of the amounts so unpaid and claimed to be due to him under the contract aforesaid, upon and by reason of his shipments during the year 1884, and demanded payment of the same, and which the defendant company did then and does continue to refuse and neglect to pay.

Twelfth. That in the latter part of the year 1884 the defendant company gave notice to the plaintiff that it would refuse to honor existing traffic contracts, and would abrogate the same, including amongst them its agreement with plaintiff respecting his
52 shipments during the year 1884 last aforesaid. Whereupon and owing to such notice and refusal of the defendant company to perform its agreement with the plaintiff, the plaintiff made arrangements with other railroad companies for the transportation of his freights as aforesaid, for and during the year 1885, and so advised the defendant company.

Thereupon, defendant company desiring, and in order to retain the transportation of plaintiff's freights, offered to the plaintiff, and did agree to renew and continue the agreement aforesaid for and during the year 1885; and further offered and agreed to pay the plaintiff the rebates and amounts then remaining due and unpaid him under the agreement for the year 1884, as hereinbefore set forth, and the same was accordingly renewed for and during the year 1885.

Thirteenth. That under and in pursuance of the agreement so renewed and continued for the year 1885, the plaintiff caused to be shipped during said year, according to the terms of that agreement, large quantities of logs, timbers, planks, staves, and other freights in accordance with the terms thereof, the same being all the freights controlled by him and intended for transportation from Western points as aforesaid, by way of Jersey City to ports and places in England and upon the continent of Europe, so far as the defendant company furnished facilities therefor and at rates which were from time to time agreed upon between them.

Fourteenth. That the plaintiff paid in full to the defendant company, and as required by it for all of its shipments during the year 1885, tariff rates upon the same as specified in the bills of lading therefor, and computed upon railroad weights therein mentioned; and in addition expended money in and about the unloading of his freights.

That the rates so paid by him were in excess of the rates
53 agreed upon from time to time between the plaintiff and the defendant company, and the weights upon which the same were computed were in excess of the shippers' weights upon which it was agreed such weights should be computed.

Fifteenth. That there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1885, as follows:

For rebates on account of rates and weights as aforesaid, and as stated and set forth in Exhibit B attached to the complaint, the sum of eight thousand and forty-six $\frac{58}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weights, upon plaintiff's freight transported to Jersey City and vicinity as aforesaid, as set forth in Exhibit B aforesaid, the sum of two thousand four hundred and forty-one $\frac{47}{100}$ dollars.

For actual cost and expense incurred by plaintiff in unloading his freights at Weehawken, as set forth in Exhibit B aforesaid, the sum of seven hundred and seventy-four $\frac{20}{100}$ dollars.

That plaintiff on or before the 1st day of March, 1886, presented to the defendant company an account of the amounts so paid and claimed to be due him under the contract aforesaid, upon and by reason of his shipments during the year 1885, and demanded payment of the same, which the defendant company did then and does continue to wholly refuse and neglect to pay.

And as conclusions of law I find:

First. That the defendant, The New York, Lake Erie and Western Railroad Company, is indebted to the plaintiff on account of his shipments during the year 1884, and under the terms of the agreement made for that year, to the sum of seven thousand seven hundred and fifteen $\frac{47}{100}$ dollars, with interest thereon since the 1st day of March, 1885, amounting in all, at this date, to the sum of $9,564.62.

54 Second. That the defendant, The New York, Lake Erie and Western Railroad Company, is indebted to the plaintiff in the sum of eleven thousand two hundred and sixty-two $\frac{27}{100}$ dollars, by reason of his shipments during the year 1885, under the terms of the agreement for and during said year, together with interest thereon since the 1st day of March, 1886, amounting in all at this date to the sum of $13,278.21.

Third. That the plaintiff is entitled to judgment against the defendant for the amount so found due, with interest thereon as specified, amounting in all, at this date, to the sum of $22,842.83.

Fourth. That the plaintiff is further entitled to judgment for costs and disbursements as against the defendant herein.

I hereby direct judgment to be entered accordingly.

Dated New York, February 26, 1889.

HAMILTON COLE, *Referee.*

(Endorsed:) United States circuit court, southern dist. of New York. Andrew Brown against New York, Lake Erie & Western Railroad Company. Referee's report. U. S. circuit court. Filed Mar. 7, 1889. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

ANDREW BROWN
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

The defendant requests the referee to make the following findings of fact and conclusions of law herein:

55 *As Matters of Fact.*

First.

The plaintiff is an alien and subject of the Queen of the United Kingdom of Great Britain and Ireland, and a resident of the State of New York.

I so find.

H. C.

Second.

The defendant is and since July 1, 1878, has been a corporation organized and existing under and by virtue of the laws of the State of New York, owning and operating lines of railroad extending from Jersey City, in the State of New Jersey, to Buffalo, Dunkirk and Salamanca, in the State of New York, at which places it connected with other railroad lines extending to St. Louis, Chicago, and other points and places in the West.

I so find.

H. C.

Third.

Prior to June 1, 1878, the said lines of railroad were owned and operated by a corporation known as the Erie Railway Company, or by Hugh J. Jewett, receiver of the Erie Railway Company.

I so find.

H. C.

Fourth.

That the plaintiff since August 25, 1882, and up to and during part of the year 1885, made certain shipments of logs, timber, planks, staves or lumber from points in the West over the defendant's said railroad to Weehawken, in the State of New Jersey, near Jersey City.

I so find.

H. C.

Fifth.

That on August 25, 1882, a verbal arrangement was made between the plaintiff, G. G. Cochran, representing the New York, Penn-
56 sylvania & Ohio railroad, and R. C. Vilas, representing the New York, Lake Erie and Western railroad, by which it was agreed that the rates on shipments of logs made by the plaintiff over the defendant's road should be as follows: From Portsmouth,

Cincinnati, and all points on N. Y., P. & O. R. R., and on business originating at C. H. & D. stations, between Dayton and Cincinnati, to New York, twenty cents per hundred pounds in the summer, or April 1st to November 1st, and twenty-five cents per hundred pounds in the winter, or November 1st to May 1st.

I so find.

H. C.

Sixth.

The plaintiff also, from time to time, made shipments of logs or lumber over defendant's railroad and connections from East St. Louis, Chicago, Vincennes, Indiana, and other Western points.

I so find.

H. C.

Seventh.

There was no continuing arrangement or agreement between the plaintiff and defendant providing what the rates should be on the plaintiff's shipments, except the verbal arrangement made August 25, 1882, which is set forth in the fifth finding of fact herein.

Declined.

H. C.

Eighth.

That Royal C. Vilas was appointed general freight agent of the Erie Railway Company in the summer of 1873, and continued to act as general freight agent of that company up to the time when its railroads and property were transferred to the defendant in June 1, 1878, and thereafter was the general freight agent of the defendant until May, 1882, at which time he became freight-traffic manager of the defendant, and retained that position until May 10, 1885.

I so find.

H. C.

57 Ninth.

That said Vilas, as general agent and freight-traffic manager, had the general management of the freight traffic on its railroad, including the shipments made by the plaintiff herein, and had also general management of making rates, and rules and regulations governing such traffic, all under the direction of the president.

I so find.

H. C.

Tenth.

That said Vilas, as such general freight agent or freight-traffic manager, did not have authority to make a contract on behalf of the defendant with any shipper for special rates, or special facilities, or rebates or concessions, in the transportation of such shippers' freight, to continue for a year; and that no such contract for a year had ever been made or attempted to be made by Vilas, without being specially authorized thereto by the defendant.

Declined.

H. C.

Eleventh.

That in or about the month of November, 1884, in pursuance of a resolution adopted at a meeting of the railroads known as the trunk lines, the defendant duly notified the plaintiff that all special rates, or contracts for special rates, facilities, rebates or concessions, were abrogated.

I so find.

H. C.

Twelfth.

That upon receiving said notice the plaintiff (in consequence thereof ceased to ship his freight over the defendant's line and) shipped 213 car-loads of logs or lumber over other lines of railroad.

I so find as amended.

H. C.

NOTE.—The words in parenthesis were stricken out by the referee.

Thirteenth.

That thereafter the plaintiff made certain shipments of
58 logs or lumber over the defendant's road, for which he paid to the defendant the freight charged thereon, as specified in the bills of lading thereof.

I so find.

H. C.

Fourteenth.

That the rates of freight so charged and paid by the plaintiff were the current or tariff rates in effect on defendant's line of railroad at that time.

I so find.

H. C.

Fifteenth.

That such rates of freight were defendant's ordinary and regular rates which were charged to ordinary or casual shippers of the same kind of freight over the defendant's road as was shipped by the plaintiff thereover during the period mentioned in the complaint.

Declined.

H. C.

Sixteenth.

That such charges for freight were paid by the plaintiff voluntarily and without protest.

Declined as immaterial.

H. C.

Seventeenth.

The amount paid by the plaintiff to the defendant for freight on the shipments made during the year 1884, mentioned in the complaint, was $16,883.15, of which amount the plaintiff claims there is due him on account of the rebates to which he is alleged in the

complaint to be entitled, under the terms of the pretended contract therein mentioned, the sum of $7,715.47.

The amount paid by the plaintiff to the defendant for freight on the shipments made during the year 1885, mentioned in the complaint, was $27,109.28, of which amount the plaintiff claims there is due him, on account of the rebates to which he is alleged
59 in the complaint to be entitled, under the terms of the pretended contract therein mentioned, the sum of $11,262.12.

I so find.

H. C.

Eighteenth.

That if the plaintiff were allowed to recover the amounts claimed in the complaint, the balance of the freight charges paid to the defendant by the plaintiff upon the shipments mentioned in the complaint, after deducting therefrom the amounts claimed by the plaintiff as above stated, would be less than the actual cost incurred by the defendant in the transportation of said shipments.

Declined.

H. C.

As Conclusions of Law.

First.

No contract or agreement between the plaintiff and defendant was in force in the year 1884, except the agreement specified in the memorandum of August 25, 1882.

Declined.

H. C.

Second.

That said agreement was terminated by notice to the plaintiff on the 21st day of November, 1884.

Declined.

H. C.

Third.

That said agreement was terminated by the action of the plaintiff in November, 1884, in shipping his freights over, or in diverting his shipments of logs and lumber to other lines than the lines of the defendant.

Declined.

H. C.

Fourth.

That the plaintiff is not entitled to recover the amounts set forth in the complaint and alleged to be due him from the defend-
60 ant on account of the rebates of three cents per hundred pounds for lighterage on the shipments therein mentioned.

Declined.

H. C.

Fifth.

That the plaintiff is not entitled to recover the amounts set forth in the complaint and alleged to be due him from the defendant on account of deduction for shippers' weights as against railroad weights of the shipments therein mentioned.

Declined.

H. C.

Sixth.

That the plaintiff is not entitled to recover the amounts claimed in the complaint to be due as a repayment of expense incurred by the plaintiff in unloading his freights at Weehawken.

Declined.

H. C.

Seventh.

That the plaintiff has failed to show any contract between the defendant and himself for the payment to him of the rebates claimed in the complaint, excepting the arrangement set forth in the memorandum of August 25, 1882.

Declined.

H. C.

Eighth.

That the freights paid by the plaintiff to the defendant upon the shipments mentioned in the complaint were paid voluntarily, and the plaintiff is not entitled to recover the same.

Declined.

H. C.

Ninth.

That the alleged contract or agreement set forth in the complaint was without consideration to the defendant, and the plaintiff cannot recover the amounts claimed to be due thereunder.

Declined.

H. C.

61 Tenth.

That the alleged contract or agreement set forth in the complaint was and is illegal and void.

Declined.

H. C.

Eleventh.

The defendant is entitled to judgment dismissing the complaint with costs, including the referee's and stenographer's fees and other disbursements incurred herein.

Declined.

H. C.

BUCHANAN & STEELE,
Defendant's Attorneys, 21 *Cortlandt St., N. Y.*

(Endorsed:) United States circuit court, southern district of New York. Andrew Brown against The New York, Lake Erie & Western Railroad Company. Requests to find. Buchanan and Steele, defendant's attorneys, 21 Cortlandt St., N.Y. U. S. circuit court. Filed Mar. 7, 1889. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

ANDREW BROWN
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

The defendant excepts to the findings of fact and conclusions of law herein as made by the referee, and filed March 7, 1889, in the office of the clerk of this court, as follows:

First.

It excepts to such portion of the ninth finding of fact made
62 by said referee as finds that in the beginning of the year 1884 the said agreement between the plaintiff and defendant was renewed for and during that year, and under and in pursuance thereof the plaintiff shipped and caused to be shipped staves and other freights, and being all of such freights controlled by him and intended for transportation from Western points, as aforesaid, by way of said city of Jersey City to ports and places in England and upon the continent of Europe, so far as the defendant company furnished facilities therefor and at rates which were from time to time agreed upon between them.

Second.

The defendant excepts to so much of the tenth finding of fact found by the said referee as finds that rates were agreed upon between the plaintiff and defendant as therein stated, or that it was agreed that rates should be computed upon shippers' weights, as therein set forth.

Third.

The defendant excepts to so much of the eleventh finding of fact found by said referee as finds that there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1884, as follows:

For rebates on account of freight and weights, as aforesaid, and as stated and set fourth in Exhibit A, attached to the complaint, the sum of six thousand and twenty-eight $\frac{90}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weights, upon plaintiff's freights transported to Jersey City and vicinity, as aforesaid, as set forth in Exhibit A as aforesaid, the sum of eleven hundred and sixty-two $\frac{70}{100}$ dollars.

For actual cost and expense incurred by plaintiff in unloading his freights at Weehawken, as set forth in Exhibit A aforesaid, the sum of five hundred and twenty-three $\frac{87}{100}$ dollars.

63 Fourth.

The defendant except- to so much of the twelfth finding of fact found by said referee as finds that at or about the time in that behalf mentioned the defendant company, desiring and in order to retain the transportation of plaintiff's freights, offered to the plaintiff and did agree to renew and continue the agreement aforesaid for and during the year 1885, and further offered and agreed to pay the plaintiff the rebates and amounts then remaining due and unpaid him under the agreement for the year 1884, as thereinbefore stated, and that the same was accordingly renewed for and during the year 1885.

Fifth.

The defendant excepts to the thirteenth finding of fact by said referee, which finds that under and in pursuance of the agreement so renewed and continued for the year 1885, the plaintiff caused to be shipped during said year, according to the terms of that agreement, large quantities of logs, timbers, planks, staves and other freights, according to the terms thereof, the same being all the freights controlled by him and intended for transportation from Western points as aforesaid, by way of Jersey City to ports and places in England and upon the continent of Europe, so far as the defendant furnished facilities therefor, and at rates which were from time to time agreed upon between them.

Sixth.

The defendant excepts to so much of the fourteenth finding of fact found by said referee as finds that the rates therein mentioned were agreed upon from time to time between the plaintiff and defendant company, and that it was agreed that such rates should be computed upon shippers' weights.

Seventh.

64 The defendant excepts to so much of the fifteenth finding of fact found by said referee, as finds that there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1885, as follows:

For rebates on account of rates and weights, as aforesaid, and as stated and set forth in Exhibit B, attached to the complaint, the sum of eight thousand and forty-six $\frac{58}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weights, upon plaintiff's freight transported to Jersey City as aforesaid, as set forth in Exhibit B aforesaid, the sum of two thousand four hundred and forty-one $\frac{49}{100}$ dollars.

For actual cost and expense incurred by plaintiff in unloading the freights at Weehawken, as set forth in Exhibit B aforesaid, the sum of seven hundred and seventy-four $\frac{20}{100}$ dollars.

Eighth.

The defendant excepts to the first conclusion of law found by said referee, that the defendant, The New York, Lake Erie and Western Railroad Company, is indebted to the plaintiff on account of his shipments during the year 1884, and under the terms of the agreement made for that year, in the sum of seven thousand seven hundred and fifteen $\frac{47}{100}$ dollars, with interest thereon since the first day of March, 1885, amounting in all, at this date, to the sum of nine thousand five hundred and sixty-four $\frac{62}{100}$ dollars.

Ninth.

The defendant excepts to the second conclusion of law found by said referee, that the defendant, The New York, Lake Erie and Western Railroad Company is indebted to the plaintiff in the sum of eleven thousand two hundred and sixty-two $\frac{75}{100}$ dollars, by reason of his shipments during the year 1885, under the terms of the agreement for and during said year, together with interest
65 thereon since the first day of March, 1886, amounting in all, at this date, to the sum of thirteen thousand two hundred and seventy-eight $\frac{21}{100}$ dollars.

Tenth.

The defendant excepts to the third conclusion of law found by said referee, that the plaintiff is entitled to judgment against the defendant for the amount so found due with interest thereon as specified, amounting in all, at this date, to the sum of twenty-two thousand eight hundred and forty-two $\frac{83}{100}$ dollars.

Eleventh.

The defendant excepts to the fourth conclusion of law found by said referee, that the plaintiff is further entitled to judgment for costs and disbursements as against the defendant herein.

Twelfth.

The defendant excepts to the refusal of the said referee to find, as requested in defendant's seventh request to find as a matter of fact, that there was no continuing arrangement or agreement between the plaintiff and defendant providing what the rates should be on the plaintiff's shipments, except the verbal arrangement made August 25, 1882, which is set forth in the fifth finding of fact requested by the defendant to be found.

Thirteenth.

The defendant excepts to the refusal of said referee to find, as requested in defendant's tenth request to find as a matter of fact, that said Vilas as such general freight agent or freight traffic manager, did not have authority to make a contract on behalf of the defendant with any shipper for special rates, or special facilities, or rebates

or concessions, in the transportation of such shippers' freight,
66 to continue for a year, and that no such contract for a year had ever been made or attempted to be made by Vilas, without being specially authorized thereto by the defendant.

Fourteenth.

The defendant excepts to the refusal of said referee to find as requested in defendant's twelfth request to find as a matter of fact, that upon receiving the notice therein mentioned, the plaintiff in consequence thereof ceased to ship his freight over the defendant's line, and shipped 213 car-loads of logs or other lumber over other lines of railroad.

Fifteenth.

The defendant excepts to the refusal of said referee to find as requested in defendant's fifteenth request to find as a matter of fact, that the rates of freight therein mentioned were defendant's ordinary and regular rates which were charged to ordinary or casual shippers of the same kind of freight over defendant's road as was shipped by the plaintiff thereover during the period mentioned in the complaint.

Sixteenth.

The defendant excepts to the refusal of said referee to find as requested in the defendant's sixteenth request to find as a matter of fact, that such charges for freight were paid by the plaintiff voluntarily and without protest.

Seventeenth.

The defendant excepts to the refusal of said referee to find as requested in defendant's eighteenth request to find as a matter of fact, that if the plaintiff were allowed to recover the amounts claimed in the complaint, the balance of the freight charges paid to the
67 defendant by the plaintiff upon the shipments mentioned in the complaint, after deducting therefrom the amounts claimed by the plaintiff as above stated, would be less than the actual cost incurred by the defendant in the transportation of said shipments.

Eighteenth.

The defendant excepts to the refusal of said referee to find as requested in defendant's first request to find as a conclusion of law, that no contract or agreement between the plaintiff and defendant was in force in the year 1884, except the agreement specified in the memorandum of August 25, 1882.

Nineteenth.

The defendant excepts to the refusal of said referee to find as requested in defendant's second request to find as a conclusion of law, that said agreement was terminated by notice to the plaintiff on the 21st day of November, 1884.

Twentieth.

The defendant excepts to the refusal of said referee to find as requested in defendant's third request to find as a conclusion of law, that said agreement was terminated by the action of the plaintiff in November, 1884, in shipping his freights over, or in diverting his shipments of logs and lumber to other lines than the lines of the defendant.

Twenty-first.

The defendant excepts to the refusal of said referee to find as requested in defendant's fourth request to find as a conclusion of law, that the plaintiff is not entitled to recover the amounts set forth in the complaint, and alleged to be due him from the defendant on account of rebates of three cents per hundred pounds for lighterage on the shipments therein mentioned.

68

Twenty-second.

The defendant excepts to the refusal of said referee to find as requested in defendant's fifth request to find as a conclusion of law, that the plaintiff is not entitled to recover the amounts set forth in the complaint and alleged to be due him from the defendant on account of deduction for shippers' rates as against railroad weights for the shipments therein mentioned.

Twenty-third.

The defendant excepts to the refusal of said referee to find as requested in defendant's sixth request to find as a conclusion of law, that the plaintiff is not entitled to recover the amounts claimed in the complaint to be due as a repayment of expense incurred by the plaintiff in unloading his freights at Weehawken.

Twenty-fourth.

The defendant excepts to the refusal of said referee to find as requested in defendant's seventh request to find as a conclusion of law, that the plaintiff has failed to show any contract between the defendant and himself for the payment to him of the rebates claimed in the complaint, excepting the arrangement set forth in the memorandum of August 25, 1882.

Twenty-fifth.

The defendant excepts to the refusal of said referee to find as requested in defendant's eighth request to find as a conclusion of law, that the freights paid by the plaintiff to the defendant upon the shipments mentioned in the complaint, were paid voluntarily, and the plaintiff is not entitled to recover the same.

69

Twenty-sixth.

The defendant excepts to the refusal of said referee to find as requested in defendant's ninth request to find as a conclusion of law,

that the alleged contract or agreement set forth in the complaint was without consideration to the defendant, and the plaintiff cannot recover the amounts claimed to be due thereunder.

Twenty-seventh.

The defendant excepts to the refusal of said referee to find as requested in defendant's tenth request to find as a conclusions of law, that the alleged contract or agreement set forth in the complaint was and is illegal and void.

Twenty-eighth.

The defendant excepts to the refusal of said referee to find as requested in defendant's eleventh request to find as a conclusion of law, that the defendant is entitled to judgment dismissing the complaint with costs, including the referee's fees and stenographer's fees and other disbursements incurred herein.

BUCHANAN & STEELE,
Defendant's Attorneys, 21 *Cortlandt Street, N. Y.*

(Endorsed:) United States circuit court, southern district of New York. Andrew Brown against The New York, Lake Erie & Western Railroad Company. Exceptions to referee's report. Buchanan and Steele, defendant's attorneys, 21 Cortlandt St., N. Y. U. S. circuit court. Filed Mar. 11.

70 United States Circuit Court, Southern District of New York.

ANDREW BROWN
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

The plaintiff brings this action to recover the amount of certain rebates, payments and allowances which he claims were agreed to be paid to him by the defendant under the provisions of two contracts similar in their terms, one running during the year 1884, the other during the year 1885.

The terms of these contracts as claimed by the plaintiff were substantially as follows:

In consideration of the plaintiff shipping all his property over the lines of the defendant and its connections, the defendant would from time to time make rates for the plaintiff, which rates should be at all times as low as those given to any other shippers of like freights over the defendant's roads or those of its competitors, and in case such rates were less than the tariff rates for the time being, or less than the rates specified in the bills of lading, the defendant would rebate and pay to the plaintiff the excess of such tariff rate to the extent the plaintiff should have paid the same.

That such weights should be computed on shippers' weights according to certain agreed measurements, which weights were to take the place of the ordinary railroad weight as specified in the bills of lading, and it would rebate and repay to the plaintiff any

excess of rate computed upon the railroad weight on the
71 amount payable by him upon shippers' weight to the extent plaintiff should have paid the same.

That it would rebate and pay to the plaintiff the sum of three cents per hundred pounds computed upon shippers' weight as aforesaid upon all freights transported by it for him to Jersey City and vicinity.

That it would repay to the plaintiff the actual cost and expense incurred by him in the unloading of said freight from the cars at Weehawken in the vicinity of Jersey City.

It is clearly proven that such an arrangement was entered into between the parties covering the year 1884, and although the defendant attempted in the latter part of that year to abrogate all special rates, it is not claimed that it could at its will terminate a contract made to run a definite time. I find no difficulty in determining that a contract as stated was made to run during the year 1884.

As to the contract for the year 1885, the evidence is contradictory. The general freight-traffic manager testifies positively that he renewed the contract for the year 1885 under the direct authority of the president. The president denies that he gave any such express authority, but does not deny that he gave the general freight-traffic manager power to take measures and make contracts to prevent shippers from leaving the road.

Without discussing the evidence fully on each side of this question, I am satisfied that the general freight-traffic manager had both from his general position and from direct authority from the president power to make this contract with plaintiff.

There is no substantial dispute as to the amount due to the plaintiff under these contracts, if they were valid.

The defendant claims that these contracts, even if in fact made, are void and illegal, as making an unjust discrimination in favor of the shipper or as creating a monopoly. As I understand the contracts they only provide that the plaintiff shall have as low rates as those given to competitive shippers on the defend-
72 ant's own road or the roads of its competitors, not that he should have any lower rates than were given to them. He was to have, under certain circumstances, a reduction from the tariff rates, but there was no agreement not to give the same rebates to other shippers. On the contrary, the agreement was to give plaintiff only as low rates as were given to like shippers. Nor am I able to see anything discriminating or unjust in the remaining terms of the contract. It appears that the agreement as to ascertaining weight was just and fair. The agreement to repay three cents per hundred pounds for lighterage was what was considered an equivalent for the loss of dock privileges by the defendant company, the company simply furnishing a lighter by which the property of the plaintiff might be conveyed to the vessel. The agreement to repay the actual expense to the plaintiff of unloading the property at Weehawken was simply to repay the plaintiff the ex-

penses he incurred in doing what ordinarily it would be the duty of the defendant to do.

In all these particulars I can see no element of discrimination, no creation of any monopoly in the shipper, no restriction of any kind on the defendant from giving the same privileges to any other shippers.

The last objection to the validity of these contracts is that they were without consideration, and this is based upon the claim that the actual cost of carrying out these shipments was greater than the amounts expended by the plaintiff, if his claim in this action be allowed.

In passing upon this point I assume the fact to be proven that these contracts as claimed would be unprofitable to the defendant in themselves, although I excluded evidence upon that point. But I cannot decide that a contract is without consideration simply because it turns out unprofitable. There was abundant consideration on the part of the plaintiff in his promise to ship exclusively by the defendant's line. I do not consider that there was any
73 violation of this agreement by the plaintiff of which the defendant can avail itself in his two shipments in the latter part of 1884, by other lines. The first shipment was made on account of the refusal of the defendant to carry out its contract, and the second on account of the physical disability of the defendant to receive the freight on account of a washout on its road.

Whatever general effect these two outside shipments may have upon the contract is covered by the renewal of this contract for the year 1885, and the promise then made to repay the balance of the rebates for 1884.

The plaintiff is entitled to judgment.

New York, February 26, 1889.

HAMILTON COLE, *Referee.*

(Endorsed:) United States circuit court, southern dist. of New York. Andrew Brown against New York, Lake Erie & Western Railroad Company. Referee's opinion. U. S. circuit court. Filed Mar. 17, 1889. John A. Shields, clerk.

74 U. S. Circuit Court, Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

SIR: You will please take notice that, upon the affidavit of Charles Steele, verified May 22nd, 1891, hereto annexed, and upon all the pleadings and proceedings heretofore had herein, we shall move this court at a stated term thereof to be held at the chambers of said court in the post-office building, in the city of New York, on May 29th, 1891, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, for an order requiring the plaintiff to forthwith enter his order upon the decision rendered herein by Judge Lacombe

July 26th, 1890, denying the defendant's motion for a new trial, and also requiring the plaintiff to forthwith tax his costs and enter final judgment upon such order on or before June 3rd, 1891, and directing that in default thereof the defendant may, at its option, enter such order and tax such costs and enter final judgment herein or else have an order declaring this case abandoned and the complaint dismissed and all proceedings heretofore had herein
75 vacated and set aside, and that such order shall direct that the form of order and judgment to be entered herein upon the said decision of Judge Lacombe be in the forms annexed to the said affidavit of Charles Steele, which are herewith served upon you, and for such other and further order or relief as may be proper.

Dated New York, May 22nd, 1891.

Yours, &c., BUCHANAN & STEELE,
Defendant's Attorneys. 21 *Cortlandt Street, New York City.*

To Charles L. Atterbury, Esq., plaintiff's attorney.

76 United States Circuit Court for the Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Charles Steele, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that said action was commenced by the service of the summons and complaint upon the defendant upon the 10th day of January, 1887; the defendant thereafter duly answered, on February 21st, and thereafter and on April 28th following, by consent, the action was referred to Hamilton Cole as referee to hear and determine the same; that thereafter the hearing upon such action duly proceeded before such referee, and upon March 7th, 1889, said referee duly filed his report, directing judgment in favor of the plaintiff for the relief demanded in the complaint; that thereafter, on March 9th following, the plaintiff's costs were duly taxed at the sum of $924.62 by the clerk of this court; that thereafter and upon March 11th following the defendant duly filed exceptions to said referee's report, and obtained an order extending the time for entry of judgment
77 upon such report, in order that the defendant might move for a new trial before this court.

That thereafter the time for the entry of judgment was duly extended from time to time, and upon June 20th, 1890, the defendant, meanwhile having made its case and exceptions for the purpose of such new trial, argued before Judge Lacombe a motion for a new trial and for judgment; that thereafter and upon July 26th, 1890, Judge Lacombe handed down a decision denying the defendant's

motion for a new trial; that thereafter and on or about the 12th day of November, 1890, the plaintiff sent to the defendant a copy of a proposed order to be entered upon such decision denying the defendant's motion for a new trial; that the defendant thereupon and on the 15th day of November, 1890, notified the plaintiff that it deemed the form of such order improper, and handed to the plaintiff a proposed form of order to be entered upon such motion, but that the plaintiff has wholly failed and neglected to notice such order for settlement or to enter any order upon such decision.

That after waiting until early in the month of May, 1891, deponent called upon the plaintiff's attorney with a view of ascertaining whether the plaintiff proposed to abandon the suit, or what other cause existed for the delay in the entry of said order and judgment thereupon in favor of the plaintiff, and deponent was then informed by the plaintiff's attorney that he intended to delay
78 the entry of judgment until after July 1st, 1891, in order by such delay to deprive the defendant of its right to appeal from such judgment to the Supreme Court of the United States; that deponent thereupon stated to the plaintiff's attorney that the defendant was entitled to have such judgment entered and to take its appeal before July 1st, 1891, to the Supreme Court of the United States, and requested the said plaintiff's attorney to proceed with the entry of such order and judgment thereupon, but that the said plaintiff's attorney absolutely refused so to do.

That the amount involved in this action is upwards of twenty thousand dollars, and that the questions involved in the decision are of paramount importance in the commercial world; and defendant therefore believes that it is advisable and proper that a decision of such questions should be had by the Supreme Court of the United States, particularly as there now exist conflicting decisions upon the questions involved in several of the circuit courts of the United States in different districts; that the jurisdiction of the United States circuit court in this action is dependant entirely upon the difference of citizenship of the parties thereto, and that unless the defendant can sue out its writ of error prior to July 1st, 1891, the Supreme Court of the United States will no longer have jurisdiction to review this case upon such writ of error, and the defendant will be deprived of its right to appeal to such court. As the defendant is advised, it is entitled to appeal from this judgment to the tribunal hav-
79 ing jurisdiction of such an appeal at the time the decision of this court was rendered, and the plaintiff is not entitled, by persistent and vexatious delay, to deprive the defendant of such right to appeal by failing to enter judgment in this action until after the defendant's right to such appeal would be extinguished by the taking effect of a new law upon the subject.

The defendant therefore desires an order requiring the said plaintiff to forthwith enter his order upon the decision rendered by Judge Lacombe herein on July 26th, 1890, and herewith submits, marked "A," the form of such order which the defendant desires should be entered; and, further, that the plaintiff be required forthwith to tax his costs and enter up final judgment in accordance with said order,

and that this court may direct that if the plaintiff fail to tax his costs and enter such judgment on or before June 3rd, 1891, the defendant shall have the right, at its option, forthwith to tax such costs and to enter such judgment, or else to enter an order declaring this action abandoned and the complaint dismissed and vacating and setting aside all proceedings heretofore had herein; and the defendant herewith submits a form of judgment, marked "B," which it desires should be entered upon such order, and asks that the same be adjudged to be the form of judgment which the plaintiff should be required to enter.

CHARLES STEELE.

Sworn to before me this 22nd day of May, 1891.
[SEAL.] GEORGE E. GRANT,
Notary Public, N. Y. City & Co.

80 "A."

At a stated term of the circuit court of the United States held in and for the southern district of New York, at the post office, in the city of New York, on the — day of ——, 1891.

Present: Hon. —— ——, circuit judge.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The parties to this action having heretofore duly filed with the clerk a stipulation in writing waiving a jury, and the issues herein having been duly referred by an order of this court, upon consent, to Hamilton Cole, Esq., as sole referee to hear and determine the same, and to report special findings of fact with his conclusions of law, and to state separately such findings of fact and conclusions of law, and the report of said referee having been duly made and filed herein upon the 7th day of March, 1889, containing special findings of fact as provided by said order, and certain other special findings of fact having been made by said referee upon the request of the defendant duly made during the trial of this action and filed herein upon the 7th day of March, 1889, and the other proposed findings requested by the defendant having been refused and this
81 action having been brought on for hearing and trial before the court without the intervention of a jury, in accordance with the rules and practice of this court, upon a case and exceptions, the report and findings of said referee, and all the various pleadings and proceedings heretofore had herein; and the said plaintiff having moved for judgment upon said report and findings, and the defendant having moved, upon the case and exceptions duly made and settled in accordance with the rules and practice of this court, to set aside said report and findings and for judgment: Now, after hearing Charles Steele, Esq., of counsel for the defendant, and Charles L. Atterbury, Esq., of counsel for the plaintiff, it is—

Ordered and adjudged that said findings of fact of the referee herein contained in his report, filed in the office of the clerk on the 7th day of March, 1889, and the special findings of fact found at the request of the defendant, and also the refusals to make certain findings of fact as requested by the defendant and filed in the office of said clerk on the 7th day of March, 1889, and also all the rulings of the said referee during the trial of the action as set forth in the case and exceptions duly made and filed herein, be, and each of the same are hereby, in all respects adopted as and for and made the findings and refusals to find and rulings, respectively, of this court, and that said report be, and the same is hereby, in all respects confirmed, and each and every of the exceptions and objections
82 of the defendant to such findings and refusals to find and to the rulings of the said referee during the trial are hereby overruled.

And this action and the issues therein having been tried by the court without the intervention of a jury, the court finds as a conclusion of law that the plaintiff is, upon the said findings of fact, entitled to judgment against the defendant for the sum of eighteen thousand nine hundred and seventy-seven and $\frac{74}{100}$ dollars, with interest upon seven thousand seven hundred and fifteen and $\frac{47}{100}$ dollars thereof from March 1st, 1885, and upon eleven thousand two hundred and sixty-two and $\frac{27}{100}$ dollars thereof from March 1st, 1886, together with the plaintiff's costs and disbursements, to be taxed by the clerk of this court herein.

83 "B."

Circuit Court of the United States, Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The parties to this action having heretofore duly filed with the clerk a stipulation in writing waiving a jury, and the issues herein having been duly referred by an order of this court, upon consent, to Hamilton Cole, Esq., as sole referee, to hear and determine the same and to report special findings of fact with his conclusions of law, and to state separately such findings of fact and conclusions of law, and the report of said referee having been duly made and filed herein upon the 7th day of March, 1889, containing special findings of fact, as provided by said order, and certain other special findings of fact having been made by said referee upon the request of the defendant, duly made during the trial of this action, and filed herein upon the 7th day of March, 1889, and the other proposed findings requested by the defendant having been refused, and this action having been brought on for hearing and trial before the court without the intervention of a jury,

in accordance with the rules and practice of this court,
84 upon a case and exceptions, the report and findings of said referee, and all the various pleadings and proceedings heretofore had herein, and the said plaintiff having moved for judgment upon said report and findings, and the defendant having moved, upon the case and exceptions duly made and settled in accordance with the rules and practice of this court, to set aside said report and findings and for judgment, and thereupon this court having ordered and adjudged that said findings of fact of the referee herein contained in his report filed in the office of the clerk on the 7th day of March, 1889, and the special findings of fact found at the request of the defendant, and also the refusals to make certain findings of fact as requested by the defendant and filed in the office of said clerk on the 7th day of March, 1889, and also all the rulings of the said referee during the trial of the action, as set forth in the case and exceptions duly made and filed herein, be in all respects adopted as and for and made the findings and refusals to find and rulings respectively of this court, and that said report be in all respects confirmed, and each and every of the exceptions and objections of the defendant to such findings and refusals to find and to the rulings of the said referee during the trial be overruled.

And this action and the issues therein having been tried by the court without the intervention of a jury, and the court having found as a conclusion of law that the plaintiff is, upon the said findings of fact, entitled to judgment against the defendant
85 for the sum of eighteen thousand nine hundred and seventy-seven and $\frac{74}{100}$ dollars, with interest upon seven thousand seven hundred and fifteen and $\frac{47}{100}$ dollars thereof from March 1st, 1885, and upon eleven thousand two hundred and sixty-two and $\frac{27}{100}$ dollars thereof from March 1st, 1886, together with the plaintiff's costs and disbursements, to be taxed by the clerk of this court herein; and the plaintiff's said costs and disbursements having been duly taxed by the clerk of this court at the sum of —— dollars: Now, therefore, it is—

Adjudged that the plaintiff, Andrew Brown, have and recover of the defendant, The New York, Lake Erie & Western Railroad Company, the sum of eighteen thousand nine hundred and seventy-seven and $\frac{74}{100}$ dollars, with interest upon seven thousand seven hundred and fifteen and $\frac{47}{100}$ dollars thereof from March 1st, 1885, and upon eleven thousand two hundred and sixty-two and $\frac{27}{100}$ dollars thereof from March 1st, 1886, amounting together to the sum of —— dollars, together with the sum of —— dollars, costs and disbursements duly taxed, making in all the sum of —— dollars, and that the plaintiff have execution therefor.

86 Endorsed: U. S. circuit court, S. D. of N. Y. Andrew Brown, plaintiff, ag'st The New York, Lake Erie & Western Railroad Company, defendant. Notice of motion and affidavit. Buchanan & Steele, attorneys for defendant, 21 Cortlandt street, New York city. Service of a copy of the within notice of motion and affidavit hereby admitted. Dated New York, May 22, 1891. C. L.

Atterbury, att'y for pl'ff. U. S. circuit court. Filed June 2, 1891. John A. Shields, clerk.

87 At a stated term of the circuit court of the United States held in and for the southern district of New York, at the post office, in the city of New York, on the third day of June, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The defendant having made a motion herein to require the plaintiff to forthwith enter his order upon the decision of Judge Lacombe rendered herein July 26th, 1890, and thereafter forthwith to tax his costs and enter final judgment upon such order, and said motion duly coming on to be heard, now, on reading and filing the notice of said motion, dated May 22nd, 1891, and the affidavit of Charles Steele, verified upon the same day and thereto annexed, and upon all the pleadings and proceedings had herein, and after hearing Charles Steele, Esq., of counsel for the defendant, in support of said motion, and Charles L. Atterbury, Esq., of counsel for the plaintiff, in opposition thereto, it is—

Ordered that such motion be, and the same is hereby, granted, and that the proposed forms for such order and judgment, annexed to the said affidavit of Charles Steele, be approved, and that
88 the plaintiff procure such order, and judgment thereupon to be duly entered herein on or before June 5th, 1891.

Ordered, further, that in default thereof the defendant shall have the right forthwith to enter such order and judgment, or, at its option, to enter an order declaring this case abandoned and dismissing the complaint herein and setting aside and vacating all proceedings of every kind heretofore had herein.

E. HENRY LACOMBE.

Endorsed: U. S. circuit court, S. D. of N. Y. Andrew Brown, plaintiff, ag'st The New York, Lake Erie & Western Railroad Company, def't. Order requiring plaintiff to enter judgment. Buchanan & Steele, attorneys for defendant, 21 Cortlandt street, New York city. U. S. circuit court. Filed Jun- 2, 1891. John A. Shields, clerk.

89 At a stated term of the circuit court of the United States held in and for the southern district of New York, at the post office, in the city of New York, on the fourth day of June, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The parties to this action having heretofore duly filed with the clerk a stipulation in writing waiving a jury, and the issues herein having been duly referred by an order of this court, upon consent, to Hamilton Cole, Esq., as sole referee, to hear and determine the same and to report special findings of fact, with his conclusions of law, and to state separately such findings of fact and conclusions of law, and the report of said referee having been duly made and filed herein upon the 7th day of March, 1889, containing special findings of fact, as provided by said order, and certain other special findings of fact having been made by said referee upon the request of
90 the defendant duly made during the trial of this action and filed herein upon the 7th day of March, 1889, and the other proposed findings requested by the defendant having been refused and this action having been brought on for hearing and trial before the court without the intervention of a jury, in accordance with the rules and practice of this court, upon a case and exceptions, the report and findings of said referee, and all the various pleadings and proceedings heretofore had herein, and the said plaintiff having moved for judgment upon said report and findings, and the defendant having moved, upon the case and exceptions duly made and settled in accordance with the rules and practice of this court, to set aside said report and findings and for judgment, now, after hearing Charles Steele, Esq., of counsel for the defendant, and Charles L. Atterbury, of counsel for the plaintiff, it is—

Ordered and adjudged that said findings of fact of the referee herein contained in his report, filed in the office of the clerk on the 7th day of March, 1889, and the special findings of fact found at the request of the defendant, and also the refusals to make certain findings of fact, as requested by the defendant and filed in the office of said clerk on the 7th day of March, 1889, and also all the rulings of the said referee during the trial of the action, as set forth in the case and exceptions duly made and filed herein, be, and each of the same are hereby, in all respects adopted as and for and made
91 the findings and refusals to find and rulings, respectively, of this court, and that said report be, and *and* the same is hereby, in all respects confirmed and each and every of the exceptions and objections of the defendant to such findings and refusals to find and to the rulings of the said referee during the trial are hereby overruled.

And this action and the issues therein having been tried by the court without the intervention of a jury, the court finds as a conclusion of law that the plaintiff is, upon the said finding of fact, entitled to judgment against the defendant for the sum of eighteen thousand nine hundred and seventy-seven and $\frac{74}{100}$ dollars, with interest upon seven thousand seven hundred and fifteen and $\frac{47}{100}$ dollars thereof from March 1st, 1885, and upon eleven thousand two

hundred and sixty-two and $\frac{27}{100}$ dollars thereof from March 1st, 1886, together with the plaintiff's costs and disbursements, taxed by the clerk of this court herein at the sum of nine hundred and twenty-four $\frac{62}{100}$ dollars.

(Signed) E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Andrew Brown, pl'ff, ag'st The New York, Lake Erie & Western Railroad Company. Order for judgment. Buchanan & Steele, attorneys for defendant, 21 Cortlandt street, New York city. U. S. circuit court. Filed June 4, 1891. John A. Shields, clerk.

92 Circuit Court of the United States Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

The parties to this action having heretofore duly filed with the clerk a stipulation in writing waiving a jury, and the issues herein having been duly referred by an order of this court, upon consent, to Hamilton Cole, Esq., as sole referee, to hear and determine the same and to report special findings of fact, with his conclusions of law, and to state separately such findings of fact and conclusions of law, and the report of said referee having been duly made and filed herein upon the 7th day of March, 1889, containing special findings of fact, as provided by said order, and certain other special findings of fact having been made by said referee upon the request of the defendant duly made during the trial of this action and filed herein upon the 7th day of March, 1889, and the other proposed findings requested by the defendant having been refused and this action having been brought on for hearing and trial before the court without
93 the intervention of a jury, in accordance with the rules and practice of this court, upon a case and exceptions, the report and findings of said referee, and all the various pleadings and proceedings heretofore had herein, and the said plaintiff having moved for judgment upon said report and findings, and the defendant having moved, upon the case and exceptions duly made and settled in accordance with the rules and practice of this court, to set aside said report and findings and for judgment, and thereupon this court having ordered and adjudged that said findings of fact of the referee herein contained in his report, filed in the office of the clerk on the 7th day of March, 1889, and the special findings of fact found at the request of the defendant, and also the refusals to make certain findings of fact as requested by the defendant and filed in the office of said clerk on the 7th day of March, 1889, and also all the rulings of the said referee during the trial of the action as set forth in the case and exceptions duly made and filed herein, be in all respects adopted as and for and made the findings and refusals to find and rulings, respectively, of this court, and that said report

with other companies, and then if it was necessary to deviate from the rates specified in such tariffs, in order to secure freight, and the conditions were such that we felt we were justified in doing it, we made special rates.

Q. Well, generally with constant and regular customers what was the practice?

Objected to by defendant on the ground that it is immaterial and incompetent, which objection was overruled by the referee, to which ruling the defendant then and there excepted.

A. We always had special contracts.

Q. Special rates?

A. I don't remember there was a time in the history of the business that full tariff rates were absolutely paid and never deviated from, either at that time or some time later. We had periods; railroad men used to have periods of virtue when they would make an agreement to maintain rates, and perhaps live up to it for a few days, but generally went back and settled.

Q. How was it during the period from 1882 to May, 1885, in this respect?

Same objection, ruling and exception.

A. The same condition.

99 I first became acquainted with the plaintiff in 1867 or 1868. Shortly after my appointment as freight agent in 1873, I approached Mr. Brown on the subject of shipping by the Erie road; at that time he was shipping by the Baltimore and Ohio road to Baltimore; that was a rival line; his business was shipping logs and timber from different points in the West, extending along the Erie and the New York, Pennsylvania and Ohio, and further west than the Erie reached, destined to Europe, and I solicited his business for the Erie Company because we wanted it, and wanted to increase our business and get any business we could through New York in competition with the Baltimore and Ohio road in Baltimore. He was then sending all his shipments of logs, timber and staves by the Baltimore and Ohio railroad; I solicited his business, and made arrangements by which he diverted it from the Baltimore and Ohio to the Erie Company and its leased lines. The general nature of the agreement entered into at that time between the plaintiff and myself was as follows: He was to turn his whole business over to the Erie Company, and he did so, and the Erie Company made special rates for him, modified from time to time by agreement between us. The same condition continued all through the receivership and down to the year 1882, the plaintiff continuing to give all his business to the company, and the company giving him special rates. In 1882 Mr. Jewett was president, and I was general freight agent, and at the beginning of that year we made a contract with the plaintiff for his business, as had been the custom every year during the period from 1873. We simply renewed the arrangement under which he had previously shipped. This arrangement was, in the first place, that he was to give us all

his business and to continue to be our shipper just as in the past, and we were to continue our arrangement with him; as to rebates, the question of the actual rates was a matter to be adjusted from time to time as the rate market might suggest; that we would repay to him three cents a hundred pounds
100 on his freight, which was called a lighterage charge, and that we would repay to him the expense which he incurred in unloading his freights from our cars at Jersey City. And there was also an arrangement by which the rates charged on his property were computed upon the measurement weight of his shipments, instead of the railroad weights as billed. There was always a tariff or billed rate at which his freights were put into the bill of lading at the point of shipment, and those are the understood tariff rates which were then in existence. The plaintiff was to pay in the first instance the tariff rates as billed upon his shipments, and then the company agreed to rebate to him the difference between those tariff rates and the special rates which had been agreed upon between the plaintiff and the company. The weights upon which the charges on his shipments were to be computed were what were called measurement or shippers' weights, as distinguished from railroad weights. Shippers' weights, or measurement weights, are the weights arrived at by taking an agreed weight for a certain measurement of lumber. The railroad weights are the weights of the shipments as nearly as can be arrived at. The loading is done sometimes in the woods where there are no scales and stations and no facilities for weighing, but the station agent is obliged to put in some weight, and this is the weight which is stated in the bill of lading. This weight was always very unsatisfactory, and to avoid all that the measurement-weight basis was agreed upon; that is to say, the shipper would measure his lumber, and the rate charged him would be based upon an agreed weight of so much a foot on his shipment. The weights agreed upon with the plaintiff were 6¼ pounds per foot on black walnut logs, five pounds per foot on oak planks, and 3 pounds per foot on poplar. Mr. Brown was to pay the freight bills whatever they were made out at by the Erie Company at Jersey City or New York, irrespective of his contract rate, and then got back the
101 difference; he rendered us his measurement weights which we agreed to accept; for instance, he would state that car 1000 charged 30,000 pounds by the railroad contained so many feet of black walnut logs at so many pounds per foot, amounting to so much weight; this was to stand in place of the billed rates in his settlements with the company. We tested his figures from time to time with a view to satisfy ourselves that they were correct, and found no fault with them. The three cents a hundred pounds, which we agreed to repay him, was what was known as the lighterage charge. I can best state it by citing a case; for instance, a shipment would be made from Chicago to New York for delivery in the harbor of New York; there was an allowance first made of three cents per hundred pounds to be given to the Erie Company from the through rate, which was participated in by all the roads billing and carrying the freight. That provided for the Erie Company making

a delivery at other than their regular station deliveries in New York harbor. We used to make arrangements by which we permitted some parties to take freight from Jersey City, relieving the Erie Company from the burden of doing the lighterage, and in such cases as that the Erie Company would refund to them this three cents. That was the basis of this three cents paid to Mr. Brown that he accepted the freight in Jersey City instead of New York or on shipboard. This other item of the agreement was that he should be repaid the actual expense of unloading his property out of our cars. Under this arrangement, as it operated, the Erie Company collected the amount of freight, as shown by the bill of lading or way bill, computed upon the weights therein stated, and then these rebates which have been mentioned were paid back to the plaintiff and prorated by the Erie Company with the companies sharing in the transportation; they were almost always made for the whole line from point of shipment, except where they were beyond what were known as prorating points, and then the amounts were divided from
102 the prorating point. The agreement for this repayment was between Mr. Brown on the one part and myself representing the Erie Company, and the repayments were made by the Erie Company under my direction. My object, as representing the Erie Company, in making this special arrangement with the plaintiff, was to secure his business for our road.

Q. What was your estimate of the desirableness of this business to the company?

Objected to by the defendant on the ground that it is immaterial and incompetent, which objection was overruled by the referee, to which ruling the defendant then and there duly excepted.

A. As freight traffic manager of the Erie road I considered it desirable to get any and all business I could at whatever rates we were authorized to make, and in the absence of special instructions, not to make certain rates or not to go below a certain basis of rates; we got all the freight we could get, and we didn't stop to figure exactly whether it paid us to handle it or not; we took it, and never stopped to figure whether it cost us more than we were getting to carry it or not; I think we very often lost. There was no other regular shipper on the line who did the same kind of business as the plaintiff, excepting that there were occasional car-loads which were shipped.

Q. Were there other such shippers on competing lines of railroad?

Objected to by defendant as immaterial and incompetent, which objection was overruled by the referee, to which ruling the defendant then and there excepted.

A. Yes.

In the beginning of the years 1883 and 1884 this contract or arrangement was renewed with the plaintiff just the same as in 1882. It was carried out in 1882 and 1883, and there was never any
103 objection to that on the part of the officers of the company.

Q. Was there any objection to the rates that you made with him, or the method in which they were estimated?

A. No; he was considered one of our most satisfactory shippers.

Defendant moves to strike out the latter part of said answer as incompetent, irrelevant and immaterial, and not responsive to the question, which motion was denied by the referee, to which ruling the defendant then and there excepted.

During Mr. Jewett's presidency I had frequent talks with him about the plaintiff's business; and particularly after Mr. Jewett arranged with Mr. Brown to give up his Oak Cliff contract. Mr. Jewett promised to give him every facility for doing his business at Jersey City that was necessary to do it in a proper manner, and instructed me to take care of him and see that he had all the facilities to make him contented as a shipper over our road. Mr. Jewett was kept informed as to the terms upon which it was being done. He never made any objection to it. The plaintiff's business was a large business; I don't remember the exact figures of it; I have been out of the business too long. The plaintiff was in the habit of rendering statements of his business as a basis of adjustment under his contract.

Defendant's counsel produces a form or sample of the statements rendered by the plaintiff to the company under this method of doing business, as follows:

104 PLAINTIFF'S EXHIBIT "A." June 28, 1888.

New York, Pennsylvania & Ohio R'y (poplar plank).

Erie Railway Co., in acc't with Andrew Brown.

No. 523. 12, 8, '84.

Date.	Erie railway. Car Nos.	Bill of lading. Car Nos.	Nos. of way bills.	No. of feet. Scribner measurement.	Shipper's weight, @ 32 lbs. per foot.	R. R. weight.	Rate.	Freight.
July 29		9160	195	8,100	28,350	33,650	20	$87 50
"		7242	194	7,200	25,200	27,850	"	72 40
Aug't 4		8468	26	7,850	27,475	32,100	"	83 46
"		8141	235	8,400	29,400	31,600	"	82 16
6		6490	234	7,370	25,795	30,500	"	79 30
		5 cars.			136,220	155,700		$404 82
136,220 lbs. @ 20c. p. 100 lbs.								272 44
Overcharge								132 38
Light'ge at Oakcliff, 3c. p. 100 lbs., 136,220 lbs. @ 3c.								40 86
Due Andrew Brown								$173 24

Which statement was offered in evidence by the plaintiff's counsel, and marked Exhibit "A" of that date.

When these statements were presented by the plaintiff I had them examined by the proper officers of the company, and if all was correct a voucher was made in the plaintiff's favor. In the routine of business he was paid on these vouchers; he had to sign them before he got his money. The papers now in my hands are a fair sample of the voucher, receipt made and taken in the course of business.

Sample of voucher offered in evidence by plaintiff's counsel, and marked Exhibit "B," as follows:

105 PLAINTIFF'S EXHIBIT "B."

No. 1380. —— account.

New York, Lake Erie & Western R. R. Co., to Andrew Brown, Dr.

Mem. No. —. (Address), Buffalo, N. Y.

		Dollars.	Cts.
1884.	For the following, as per bill rendered, filed in auditor's office at New York, and certified by gen'l freight agent, viz:		
Aug. & Oct.	Ac. claim No. 537. Ac. on lumber shipped from the West con'd to Andrew Brown, Jersey City, N. J. Billed from Marion S. S. line, Aug., '84, w. bs. 844 & 1067; Oct., '84, w. bs. 2,070,306, as per bill (161.64).....	$104	43
	Drawback & oc..... $60 07		
	Lessee N. Y., P. & O. R. R..... 44 36		
		$104	43

I certify that the above account is correct; that the items therein specified were duly authorized and contracted for, and were received for the use and benefit of the New York, Lake Erie and Western Railroad Co.

R. C. VILAS,
Freight Traffic Manager.

I certify that the above account has been examined by me and found correct, and is hereby approved for payment.

W. FARRINGTON,
Assistant Auditor.

Countersigned:
N. S. RUTTER,
Auditor of Disbursements.

106 Received —— —, 188–, of the treasurer of the New York, Lake Erie & Western R. R. Co.:

One hundred and four $\frac{43}{100}$ dollars in full of the above account.

$104.43

READ THIS.—The above receipt must be dated and signed by the party in whose favor this voucher is made; or when signed by another party, the authority for so doing must in all cases accompany the voucher; and this receipt must not be cut off from the body of the voucher.

The following draft was attached to the above:

APR'L 16, 1885.

No. 47582. $104.43.

Treasurer of New York, Lake Erie & Western Railroad Co., 21 Cortlandt Street, New York.

Pay to the order of J. B. Hoffman, agent, one hundred & four $\frac{43}{100}$ dollars in full for voucher.

This draft is valid only when signed by Andrew Brown.
EDWARD WHITE, *Treasurer.*

In your hands for lumber, Aug. & Oct., '84.
ANDREW BROWN.

These special rates in actual practice were generally fixed by me according as rates were then going from time to time.

Q. How did these rates, the net result of the rates charged to Mr. Brown after these discounts, all included, compare with those results from other goods of similar class or the same general character?

A. We had no regular shipper of the same class of goods.

Q. As to the actual result, were they less than the prevailing rates on lumber?

107 A. As compared with the lumber rates they were generally about the same.

Q. Was there any competitor to Mr. Brown in this kind of business shipping over your road?

A. No; not any regular shippers.

Q. He had a choice at all points, I suppose, between you and other rival lines?

A. Not and carry out his contract.

Q. But independent of your contract, it was your contract that kept him from the rival lines?

A. Well, yes. I think there were rival lines over the whole region to which the plaintiff's business extended; I don't know of any point that there were not; besides the Baltimore and Ohio, there were the New York Central and Pennsylvania, and their connections, the Lackawanna, and all the roads coming to New York and their connections were competitors of ours to almost all parts of the country. We always tried to keep track of what they were doing with their regular customers during this period. From my knowl-

edge of the railroad business I would say that such arrangements as we made with the plaintiff were common arrangements made by other companies with regular shippers, that is to say, the other companies were doing the same thing; we always tried to claim that we got a little higher rates than our competitors.

Q. Without such arrangements as those you made with Brown how could you maintain and protect the business of the company?

A. We would not have had much.

Q. From 1882 to 1885 what was the state of the business between the Erie and the other lines as to activity and closeness of competition?

A. It was very active.

I remember a meeting of the trunk lines in November, 1884, at which Mr. King was present; I am not sure whether it was before or after his election as president of the defendant. He was connected with the defendant before he was elected president, as
108 assistant to the president. The meeting was in November, 1884; it was a meeting of the trunk-line presidents, and some of the Western connections of the trunk lines, held in Commissioner Fink's office. The upshot of it was that they all agreed to be virtuous and good and not to cut any rates, and abrogate all arrangements on east-bound traffic, and never cut another rate, and Mr. King instructed me to notify all our shippers with whom we had special arrangements to that effect, abrogating every existing arrangement, which I did, and I so notified the plaintiff. Mr. King gave me instructions to comply with the resolutions that were adopted at that meeting, and I told him all right, I would carry out his instructions. But it was a sure thing in my mind that the Erie Company would get badly left if we did; that we would lose our business. In other words, I felt that our competitors would not live up to this agreement as strictly as Mr. King intended to. He told me that he proposed to carry out that agreement absolutely. He was a new man on it, and he was not going up to Mr. Fink's office to make agreements to violate them, and he said that the orders must be given and carried out exactly as they read. I gave the orders, and notified the plaintiff immediately afterwards. I observed that the general business commenced to leave us; we commenced to suffer from it, and it was not until in January that I convinced Mr. King that our competitors were deceiving us, and at that time, after I did convince him of it, he instructed me to take care of our business, and not to lose any more customers; not to lose another shipper; to take care of them, and make them such rates as would retain their business; make such contracts as would be necessary. The plaintiff, before January of that year, applied to me for an arrangement for the year 1885. He protested against the abrogation of his contract from the time I notified him about it, and repeatedly saw me with reference to the continuance of his agreement for the balance of the year 1884, and also for the
109 renewal of it for the year 1885. I remember receiving the following letter:

"JANUARY 22, 1885.

R. C. Vilas, Esq., freight-traffic manager, N. Y. city.

DEAR SIR,—It is desirable to have some understanding regarding duration of my present arrangements with your road for shipping timber, lumber and staves, and I propose that you make it good until December 31st. Unless we can agree upon this I do not feel justified in refusing the facilities and contracts offered by other roads willing to specify a longer time than to December 31st next. Please give me your answer at an early date, and oblige,

Yours truly, ANDREW BROWN."

Up to the time this letter was received the plaintiff had continued his shipments; he had not taken away any of his business to other roads.

The above letter offered in evidence by the plaintiff's counsel, and marked Exhibit "C."

After that I went to see Mr. King; I do not remember whether I took this letter or not; but Mr. Brown came to my office for a final answer; I do not remember the exact date; it was about that time, in January. It must have been subsequent to that letter, because it was the date on which I renewed his contract. I went to Mr. King for the special purpose of having a decision reached in Mr. Brown's case. I told him exactly the situation as Mr. Brown had presented it to me; that he had other arrangements offered him, which were really better than ours, and that we had got to decide that day. He had been waiting and waiting for an answer; that he was then in my office waiting for an answer, and must know at once; and I talked generally with Mr.
110 King about the situation, and he finally told me to renew the arrangement with Mr. Brown for the year 1885, and not to lose another customer. He instructed me to continue his arrangement and settle with him under the contract for the balance of 1884 not already settled for. He admitted that the evidence that I had shown him and produced to him had convinced him that he had been deceived. Mr. King's office and mine were in the same building, and Mr. Brown was waiting in my office for an answer. I went back to him and told Mr. Brown that his contract would be renewed for the year 1885, and that we would continue the contract just as though no notice had been given him, and settle with him for 1884. I told him that Mr. King and I had been in conference, and that Mr. King had authorized me to renew the contract and to settle for 1884. From that time until May, 1885, when I left, Mr. Brown continued his shipments under this general arrangement, and during that time I continued to settle his bills as I had been ordered by Mr. King. As far as my office was concerned they were made up and attended to.

Q. State whether the same result was reached and to what extent in January, 1885, with other shippers. Was this the only case in which you had these conferences with Mr. King and received your instructions from him?

Objected to by defendant's counsel as immaterial, incompetent and irrelevant. Which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

A. Oh, no, sir; a great many other cases.

I don't remember about arrangements for the entire year in 1885. The agreement of November, 1884, was to abrogate all arrangements on east-bound traffic, and it was very soon evident that our competitors were not living up to it, and Mr. Newell, of the Lake Shore road, admitted to Mr. King, in my presence, in Com-
111 missioner Fink's office afterwards, that he would be obliged to settle certain claims running after that date of November.

Q. Down to the time you left, the company of course got the resulting benefit of all contracts that you made and rates that you fixed for freight?

A. Certainly.

Q. And did they ever in any instance repudiate your action?

Objected to by defendant's counsel as immaterial, incompetent and irrelevant. Which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

A. Not that I know of.

Q. And the rebates and allowances and drawbacks, whatever you agreed on, were paid?

A. I don't know what they did after I left.

Q. Up to the time you left were they not?

A. I think so; I don't remember of any case that was repudiated; I never heard of it.

The witness was then cross-examined by defendant's counsel, and testified as follows:

The meeting of the trunk lines that I referred to, took place on November 14, 1884, and it was subsequent to that meeting that Mr. King directed me to abrogate all contracts for special rates of every kind, and to maintain rates. In pursuance of that instruction, instructions to that effect were issued to my subordinates; I don't remember how they were given, whether from my office direct, or how.

Press copies of letters written by the witness to the effect, that on and after this date, November 15th, the day succeeding the trunk-line meeting, there will be no deviation from the tariff, were put in evidence, and marked Defendant's Exhibits "A" and "B," as follows:

112 DEFENDANT'S EXHIBIT A. June 28, 1888.

New York, Lake Erie & Western Railroad Co.

Office of the freight-traffic manager, No. 21 Cortlandt street.

(Copy.)

NEW YORK, *November* 15, 1884.

H. R. Duval, Esq., gen. m'g'r G. W. D., etc., N. Y.

MY DEAR SIR: By resolution of the presidents of the trunk lines, and their affiliated connections, the east-bound rates are to be restored to the tariff of July 21st last, taking effect on Monday, the 17th inst.

On and after that date this company will not participate in any deviations from such tariff, and you will please give instructions at once to all parties interested to that effect, for under no circumstances will we deviate from the resolution as stated.

Yours very truly,

(Signed) R. C. VILAS,
Freight-traffic Manager.

DEFENDANT'S EXHIBIT B. June 28, 1888.

New York, Lake Erie & Western Railroad Co.

Office of the freight-traffic manager, No. 21 Cortlandt street.

(Copy.)

Henry C. Vilas, Esq., gen. m'g'r Commercial Exp. & E. & N. S. Desp., Buffalo.

MY DEAR SIR: By resolution of the presidents of the trunk lines, and their affiliated connections, the east-bound rates are to be restored to the tariff of July 21st last, taking effect on Monday, the 17th inst. On and after that date this company will not
113 participate in any deviations from such tariff, and you will please give instructions at once to all parties interested to that effect, for under no circumstances will we deviate from the resolutions as stated.

Yours very truly,

(Signed) R. C. VILAS,
Freight-traffic Manager.

I stated that subsequent to this trunk-line meeting instructions were given me by Mr. King, and I gave instructions generally, among others, through the letters to my subordinates (Defendant's Exhibits "A" and "B"), that on and after that date all special rates would be abrogated and the tariff would be observed. Those instructions were carried out for the time being, I guess, but afterwards some arrangements were made, not a great many, and they

were kept in effect. I don't know how long they were carried out; I don't remember. I do not think those instructions were carried out for the balance of that year, up to January, 1885. I think there were some special arrangements that were admitted. The Western connections of our road had a great many east-bound arrangements that they were determined should not expire; that is to say, they did not propose to put in effect this resolution in this order to abrogate all rates suddenly they said they wouldn't do it. We had a great time with the Chicago and Grand Trunk road; they simply said they wouldn't do it; we would have to carry out the contracts and arrangements; that it was not proper or just to shippers to notify them suddenly that the arrangement had ceased; so I don't recall from memory just what was done in the way of carrying that out. I know afterwards that a great many arrangements were carried out from the date of this resolution, and rates were not abrogated in effect.

Q. Were any of those special contracts in force after January 1, 1885?

114 A. I don't remember the detail of it; there was a cutting of rates going on all the time.

Q. Did you on January 1, 1885, have any special contract with anybody in regard to rebates?

A. Well, I don't remember just when the date was; there were special arrangements carried out on shipments that were made at that time. In other words, all the freight that was shipped in November and December did not pay the full tariff rate.

Q. After the 31st of December, 1884, and the 1st of January, 1885, did you have any of these special contracts in existence?

A. Well, there were special contracts in existence that the Erie Company honored.

Q. I call your attention to a press copy of a letter (hands it to witness). State whether you recognize it, and whether it was received by you at or about the time indicated.

A. I don't remember.

Q. You are unable to state about that?

A. I couldn't remember; it is a letter from John King, president, dated December 22d, addressed to me.

Q. Will you look at the press copy of the letter now shown you, and see whether that will refresh your recollection (hands it to witness)?

A. That is a letter dated December 23, 1884, addressed to me by Mr. John King, president.

Q. That letter was sent at that time?

A. I presume so.

Copy of letter offered in evidence, marked Defendant's Exhibit "N," as follows:

DEFENDANT'S EXHIBIT "N."

(Copy.)

NEW YORK, *December 23rd*, 1884.

Mr. John King, president.

MY DEAR SIR: Responding to your favor of yesterday I would say that it is distinctly understood that after the 31st of December inst. we will not have in any form a single contract on East-bound through traffic.

115 With reference to the West-bound through traffic would say, that it is distinctly understood that we will not have in any form a single contract on the traffic from New York; but we have some arrangements on West-bound business from Boston, and from points in the vicinity of New Haven and Hartford, from Albany, from Philadelphia and Pennsylvania points, which will continue in effect after the date mentioned unless we abrogate them before that time. In giving the instructions I did not include this traffic just above referred to, as I did not understand your instructions covered it; if, however, you desire such arrangements to cease with this month, there is nothing in the engagements which will prevent its being done. Will you kindly instruct me?

(Signed) R. C. VILAS, *F. T. M.*

Q. Can you state whether this (handing witness paper) is the communication which you referred to in your letter as "your favor of yesterday?"

A. I should think it was.

Letter read in evidence, and marked Defendant's Exhibit "O" of this date, which is as follows:

DEFENDANT'S EXHIBIT O. June 28, 1888.

New York, Lake Erie & Western Railroad Co., office of the president, No. 21 Cortlandt street.

NEW YORK, *Dec. 22d*, 1884.

R. C. Vilas, Esq., freight-traffic manager.

DEAR SIR: Is it distinctly understood that after the 31st of December, 1884, we have not in any form a single contract on through freight East or West bound?

Respectfully, JOHN KING, *President.*
P.

116 I had conversations with Mr. King with reference to Mr. Brown's business subsequent to November; I do not remember to what extent our conversations extended, or whether I fully acquainted Mr. King with all the terms of what I considered Mr. Brown's arrangement.

Q. Did not Mr. King suggest to you that if Mr. Brown got all the rebates which he claimed under this arrangement there would be no profit left in his business to the road?

A. Not that I remember.

Q. Will you swear that he did not?

A. I will swear I don't remember his ever saying it.

Q. Wasn't there an estimate made showing what the earnings per ton per mile of Mr. Brown's business was, on the basis of the arrangement he claimed?

A. I don't know.

Q. Did you ever see such an estimate?

A. I don't remember it.

Q. Do you recollect what the rate per ton per mile was, the net rate which accrued to the Erie Company, after deductions were made as Mr. Brown claimed?

A. No, sir.

Q. Can you state whether or not the net revenue from Mr. Brown's business was less than the actual cost of Brown's transportation?

A. No, sir; I never went into those kinds of figures.

Q. You were interested in seeing the Erie road obtain a large and profitable business?

A. Yes, sir.

Q. If Mr. Brown's business in its net returns to the business of the Erie road paid less than its cost of transportation, would you regard that as profitable business?

A. I don't know what the cost of transportation is; we often took property that paid us less than Mr. Brown's business—a good deal less.

Q. Suppose that Mr. Brown's business paid less than the actual cost of transportation, would you consider that profitable business?

A. It depends upon the circumstances.

Q. I am assuming that it cost more to carry it than it came to. Do you think that would be profitable business?

117 A. Sometimes it might be considered so. It might be desirable to do it for the time being rather than to lose certain customers, hoping to get higher rates after that.

Q. But suppose that extended over a period of years, would you consider that profitable business for the road?

A. No, sir; not to do all the business at a loss, of course not.

Q. You said it was part of your business to solicit business for the Erie road. Would you consider it proper action on your part to solicit business which paid less than the cost of transportation, covering a period of years?

A. Not if I was satisfied that it was less than the cost of transportation.

Q. Wasn't it a part of your business to know whether or not the business you solicited was profitable or unprofitable?

A. Not exactly, because we were competing for business in the market, and we either had to take business at the rates other roads

were taking it or go without it. Sometimes we took it for less than we could afford to take it.

Q. But you stated you thought Mr. Brown's business was so desirable for the road you were anxious to make him large concessions to get it.

A. I don't think I stated it so.

Q. Well, did you consider Mr. Brown's business a desirable business for the road to get?

A. Yes, sir; I did.

Q. Were you willing to make him all these concessions you have stated in order to get that business?

A. Yes, sir.

Q. Were you aware when you did that that Mr. Brown's business was paying less than the cost of transportation?

A. No, sir.

Q. Did you never look into that at all?

A. No, sir.

Q. Did you consider you performed your duties properly if you went on soliciting a lot of business without knowing whether it paid or not?

A. Yes, sir.

Q. It was no object to you whether the business paid or not?

A. No, sir.

118 Q. You didn't care whether the business paid or not?

A. Yes, sir; I did.

Q. Why didn't you investigate it?

A. Because I don't think it is competent for any man to tell what it costs to handle freight. I never paid much attention to the figures myself, but you have got to take the aggregate business for a long period, and take your results from that. I believe it is impossible to determine exactly what it costs to do the business. You can figure the cost of running a train, and how many tons there are in that train, and get at the cost to that extent, but there are a great many things in connection with the managing of a railroad that you are apt not to stop to figure. You can only approximate to the cost of running a road. There is a certain limit in which you can tell whether the business is profitable, but you cannot tell when a man comes to you and wants to give you his business whether that business is going to pay you or not, because it will depend altogether upon circumstances. I have taken freight from Buffalo to New York at a rate that I knew we could not afford to do our business at for a year. There might be a great quantity of cars at Buffalo, and we wanted them East, and a great many things enter into the question what you will do when a great amount of freight is offered you. You cannot stop to consider whether it will pay or not. You cannot do the business on that basis.

Q. You can tell generally, can't you, whether the business is profitable or not?

A. You can tell if you had a good, big rate whether it would pay you, or if there was a very thin rate whether it would not pay you,

but it might be an object to take a shipment, even if you don't make a profit.

Q. Suppose you are satisfied that the rate you get is not a profitable one would you consider such a business a desirable business to make a contract for a year for?

A. No, I would not.

Q. There was a good deal of rate cutting after the first of January, 1885, wasn't there?

119 A. I have never known the time when there was not; for any great length of time.

Q. Did you ever have any conversation with Mr. King as to the advisability of taking business that didn't pay?

A. Yes, sir.

Q. What was his policy with regard to that?

A. When he first came to the Erie road his policy was not to take it, but he changed it in a very short time.

Q. When did he change it?

A. At different times.

Q. Give one time?

A. I think, before he was made president, when he was assistant, he would say so to Mr. Jewett, and he has said we wouldn't take freight below a certain figure, and afterwards within three or four days told me to take it. We took a lot of grain from Chicago at a very low rate.

Q. Wasn't it his policy not to take business that didn't pay?

A. No; not for a permanent policy. I think he meant to maintain his rates and his agreements, and he said so to me that he would do it, at least for a time, and he did test the question, but he got over that.

Q. When did he begin to get over this?

A. It didn't take long.

Q. Was it subsequent to this trunk-line meeting?

A. That was one of the times.

Q. That was one of the times when you think he determined to maintain rates?

A. He did go into that agreement honestly to maintain it.

Q. How long was it before you convinced him that he was doing wrong, and he had to cut rates?

A. It was not a great while.

The Grand Trunk road convinced Mr. King that our competitors did not live up to that agreement, and, I think, afterwards he paid a great many claims for overcharges, the result of agreements in effect when this resolution was passed in November.

Q. Why did he write you that letter in December, asking whether there would be any special contracts in force after December, 1884?

120 A. That was before he was convinced probably, because this agreement was not until the middle of November.

Q. Was it true, as you have stated in that letter, there (Defendant's Exhibit N), that there were no contracts in force after the first of January, 1885?

A. I think that letter book of mine, if you will look at their letters, will show what the instructions were; I don't remember—it was three years ago—the detail of it.

Q. Was it a fact that after the first of January, 1885, there were or were not special contracts?

A. If you will look in the record of the Erie road you will find you have paid rebates on special contracts right up to this date.

Q. Are you able to answer my question specifically?

A. I don't remember; I think it was so, that there were contracts carried out.

Q. I want to ask you a little more particularly about this authorization by Mr. King of Mr. Brown's contract in 1885. Do I understand you to state that Mr. King in so many words authorized you to renew that contract?

A. Yes, sir.

Q. Can you fix the date when that was done?

A. Not exactly; no. I don't remember the exact date. It was when Mr. Brown was in New York and had come to New York for the purpose of getting a final settlement, and said he must have it before he left my office, and that he had parties waiting to take his business on more favorable terms if we declined it.

Q. Did you go to see Mr. King about it?

A. Yes, sir.

Q. What did Mr. King say, so far as you recollect?

A. He expressed himself to the effect that I must not lose any more custom, and said I could renew the arrangement with Mr. Brown.

Q. Are you positive about that?

A. Yes, sir.

Q. Are you as sure about that as of the rest of your testimony?

A. Yes, sir; as sure as I can be; that is my recollection of it.

121 Q. You had no authority to renew that contract unless Mr. King agreed to it?

A. I wouldn't do it. I think I had the authority to make any arrangement I pleased.

Q. Mr. Brown was aware you were going to see Mr. King about it?

A. Yes; I wouldn't make a contract for a year with anybody without consulting a higher official; I never did.

Q. When Mr. Brown came back you told him you were going to see Mr. King first, and then let him know?

A. Yes, sir.

Q. And then you came back and said to Mr. Brown that Mr. King had authorized the contract?

A. Yes, sir.

Q. And Mr. Brown understood very well that it was Mr. King that authorized it, and not you?

A. Yes, sir.

Q. You were asked on your direct examination as to settlement made with Mr. Brown after January, 1885. Do I understand you

to state that settlements were made still after that date on the basis of his contract, as you stated?

A. It is a matter of record. I think I stated I can't remember the details; but my recollection is that if any claims came in they were cared for in the usual way.

Q. Can you recollect any claim coming in and being put through?

A. No, I can't remember; it is a matter I can find out at the office.

Q. You can't say from memory whether it is so or not?

A. No.

These arrangements for special rates were confidential arrangements with each shipper; we didn't publish them at all; we might advise if we were making an arrangement by which a connection would participate—to that extent we would make public. I don't think the rates that Mr. Brown had with us were lower than the going rates for lumber at the time made on our railroad. There was no regular large lumber-shipper on our line like Mr. Brown. There were other large shippers in existence, but not on the Erie
122 road; we had the best large shipper in the country. We had occasional log-shippers on our line; they would ship from the West; our fast-freight-line agents would get hold of them from the West.

Q. Suppose an ordinary log-shipper came in to you, would you give him the same rate as Mr. Brown had?

A. If he promised as large a business.

Q. If he didn't, you would not?

A. It would depend.

Q. Would you give him the same rate?

A. If he was a desirable shipper and we wanted his business.

Q. Suppose he simply came to you, an occasional shipment, would you give him the same rate as Mr. Brown had?

A. It would depend on how loose rates were.

Q. What would be your rule about that?

A. The circumstances of the case and the situation would have to be my rule.

Q. The fact was you gave Mr. Brown better rates on account of his business because you thought his business was large and desirable, is that it?

A. I don't know that his rates were any lower than anybody could get at times; I guess at times Mr. Brown was paying full up to what anybody could get a car-load shipped for in the West.

Q. You had already given him as low rates as he wanted, hadn't you?

A. I don't know, the rates fluctuated, he had rates from the Ohio River points and the N. Y. P. & O. that were stationary. I think the vouchers will show that.

Q. Can you state what those rates were?

A. I don't remember what they were; the vouchers will tell; I think there were two rates for the year.

Q. If they are a matter of record we can find that out.

A. They are a matter of record because the vouchers are there.

Q. That is what you allowed him?

A. We only allowed him what we agreed to. I don't remember the rates, but I know that they were often a great deal higher than we were carrying property for over our road.

123 Q. The same kind of property?

A. I mean what we classify as the same property.

Q. Supposing a stranger should come to you with an occasional shipment and ask you for a rate on logs, the same that Mr. Brown shipped, would you give him as good rates as Mr. Brown?

A. It would depend on what he wanted.

Q. Wouldn't you charge him the tariff?

A. Yes, sir; unless he had a large quantity.

Q. This weight arrangement of Mr. Brown's according to that instead of taking the actual rates he estimated the weights of his shipments by measurement?

A. Yes, sir.

Q. Why was that done?

A. That was done when he first came with the road. I don't remember fully why it was done, but the difficulty of getting at the correct weights at the point of shipment was one of the reasons, then the logs were green and wet and all that, and so the actual estimated weights at railroad stations was almost always too high, and this plan was adopted, that was away back in 1873.

Q. Isn't it a fact that this plan of weights on the shippers' weight always reduced the amount of what the railroad weight was?

A. I don't know that it always did.

Q. Didn't it as a rule?

A. It depends upon what the property is, a station agent who has no scales, if a man loads in a car-load of stuff he has got to make a weight for his way bill, and he had rather have it too much than too little, so he is apt to guess at it a little higher than it actually is.

Q. Suppose this occasional shipper came and made a shipment of lumber, what would you charge him on—railroad weight?

A. Yes, sir; we would be apt to.

With regard to the lighterage I said that we agreed to pay Mr. Brown three cents a hundred pounds for lighterage as an allowance. As matter of fact the Erie Company furnished a lighter, but they did not lighter his logs, the allowance was made to him to

124 put him on the same footing as other shippers, for instance, an occasional shipper came to the fast-freight-line agent in Cincinnati, and said I have a car-load of logs I want to send to Antwerp or London, I want a through rate on it, the agent telegraphs to the foreign freight agent to get the lowest steamer rate, and he will say it is fifteen cents a hundred pounds and the rate to New York is twenty-five cents, and he has those two making forty cents for a through rate, and he ships the car-load of logs to London, paying no more attention to it than you do when you check your trunk, the Erie railroad have to do all the lightering and make delivery at any place in New York harbor; for this extra service they were allowed three cents; this three cents was paid to Mr. Brown on the theory that we did not do any lighterage for him, as matter

of fact we did furnish him a lighter, but that was because we took the dock facilities away, the Erie Company did not load the lighter or unload it, they simply furnished the lighter as a bridge to connect the dock with deep water, we could not furnish him with facilities so as he could bring his vessel up to the dock and load it, and we offered to furnish him a bridge to float the stuff on and float it over to his vessel.

Q. You stated on your direct examination that Mr. Brown's business was a large business, can you give us an idea what you mean by a large business?

A. It depends upon the class of business; it was large for that kind of business; I think he was the largest shipper in the country of that kind of business.

Q. Did you make any tests of these measurements of Mr. Brown's to see whether he gave correct measurements?

A. Yes, they were made; we had some lumber-yard people come down to Long dock and measure it.

Q. Ordinarily Mr. Brown gave you his measurements and you settled on his measurements?

A. Yes, sir; we accepted his statements.

Q. About this contract you speak of, you say it was renewed
125 from year to year; that it was renewed in the year 1884 for a year?

A. For the year 1884, yes, sir; I said it was customary to renew it from year to year.

Q. For how long did the renewal extend?

A. For the year.

Q. Up to the 1st of January of the succeeding year?

A. Yes, sir.

Mr. Felton was appointed first vice-president in January, some time before I left; he was my superior officer, and had special charge of the traffic relations of the company. I remember talking with him about Mr. Brown's business; I don't remember the details of it. He never authorized me to renew Mr. Brown's contract. If I recollect right, it was renewed before he got into the harness much, but I don't remember the date of his coming.

On redirect examination the witness testified:

The general understanding was with Mr. Brown that his freights were to be regulated by the charges which were made by other roads on the same kind of property. That was the general understanding, that we would always take care of him and make him as good rates as other shippers. From time to time he would advise me that other roads were making to their shippers rates different from those we were making, and that would be my reason for making special rates to Mr. Brown. The rates that were given to Mr. Brown were fixed to put him in position to compete with shippers of like traffic over other roads; that is, we would agree to give him as favorable a rate as other shippers were getting from other roads.

The testimony of the witness, Vilas, was here interrupted by the examination of the plaintiff, Andrew Brown, after which, being recalled, he testified as follows:

I heard Mr. Brown's testimony yesterday regarding the different rates which he stated were agreed rates to be charged upon his traffic from the various points named by him. I believe it
126 is a correct statement of the agreed rates that prevailed between *t*us at the time that I left; they were fixed to give him as favorable rates as other shippers were getting from other roads. The method of using shippers' weights was a matter of communication between us and connecting lines who participated—they all agreed to it, nor did any of them make an objection to paying their proportion of these claims and overcharges or drawbacks.

On recross-examination the witness testified as follows:

Q. You say that you did not intend to discriminate between Mr. Brown and any other lumber-shipper like Mr. Brown?

A. No, sir; that is, not as a large shipper; I mean not as a large shipper.

Q. You had occasional lumber-shippers?

A. Yes.

Q. Did you give them the same rates as Mr. Brown?

A. I don't think I had an occasional shipper come to me for a rate; they were generally shippers from the West who would make their shipments without coming to New York to see about the rate of a car-load of logs.

Q. And you charged them the tariff?

A. I don't remember. The Western roads would have control of that, you know; they would not come to me. A man having a car-load of black-walnut logs from Kentucky or Kansas would not come to New York to arrange for a rate; he would arrange it out West.

Q. What rate would the company charge him—the tariff?

A. They would not charge him the tariff if the connecting lines that we were doing business with made him a less rate. As a rule almost always we were inclined to honor these rates that were made by the connecting road. There were times when we would get virtuous, and say we would not honor cut rates, the rates made by Western roads, but it wouldn't last long.
127 Q. In the case of a shipper like that would you charge him the same rates as Mr. Brown?

A. Not unless he made the arrangement with the Western roads.

Q. Was the rate charged by the Erie to an occasional shipper the same rate as charged to Mr. Brown?

A. I don't know what the rate would be; it would depend upon what contract he made. We would not make a contract with him.

Q. Suppose he had not made a contract?

A. Then it would be the tariff rates.

Q. Were there ever any lumber shipments made by people who had no special contract with the road, occasional shipments?

A. Oh, yes.

Q. And those shipments, if the man had no contract, made no arrangement, you charged the tariff for?

A. Certainly.

Q. And connecting lines I understood you to say participated in the rates which you made for Mr. Brown in the reduction, and also in the weights and reduction by weights?

A. Yes.

Q. Did they participate in the lighterage that was paid him?

A. The three cents; yes, sir.

Q. Was that not simply an amount deducted from the through rates?

A. That makes them participate in it.

Q. That is paid to the Erie road usually?

A. Yes; but if the rate from Chicago to New York is twenty cents, and the property is billed lighterage free, it is billed at seventeen cents, and the road only prorated seventeen cents, and they participated in the three cents, three cents being added to the Erie proportion, and allowed to them.

Q. How about the expense of unloading at Weehawken, was that participated in by the other roads or paid by the Erie?

A. I think that was purely an Erie matter.

By Mr. CHOATE:

Q. Do you remember any instance in 1884 or 1885, as long
128 as you were there, of any shipper of lumber from any points beyond your road West, shipping without some agreement as to rates?

A. There were occasional shipments.

Q. I ask you now, limiting it to 1884 and 1885, while you were there—do you remember any?

A. I don't remember that there were any shipments excepting very rarely, of the character of Mr. Brown's.

Q. Whether by special contract or not, you don't know whether there were any?

A. No, sir.

By Mr. STEELE:

Q. Don't you remember that there were, as a fact, occasional shipments made without special contracts?

A. No, sir; I don't know whether there were special contracts made or not. A man might go to the railroad agent in the West, in East St. Louis, and have a car-load shipped and make an arrangement, and I might not know anything about it until the voucher came on and I would pay our proportion.

Q. Do you remember any cases where a customer just came along in the ordinary way with a car-load of lumber, shipped it, and paid the tariff rates?

A. No; I know we occasionally had a car-load of logs come along and I know sometimes we used to have a great deal of trouble with it. They would come there sometimes from away out in Kansas with more charges on them than the property was worth, and I

know we had to take possession of some, and in some cases I think we got less than the charges—there were some storage charges added. A man would ship from out there a car-load of two of his black-walnut logs, and I couldn't tell whether he got a contract from the road he shipped it by or not. He would send it on and take the chances of getting some money out of it. Or if he was a man who understood it, and had facilities to ship to Europe, he could get a through bill of lading direct. A good many did that, and so did not bother with the expenses in New York. But, of course, I can't remember of special, single lots, because they
129 would not come to me for a lot of a single car-load for a rate.

Q. In case there was no special arrangement made, you probably would not hear of it; it would come along in the ordinary way?

A. Yes, it would come along in the ordinary way.

By Mr. CHOATE:

Q. When there were occasional shippers from points west of your line, you had nothing to do with fixing the rates?

A. No, sir.

Q. It was done by the other roads?

A. Yes, sir.

ANDREW BROWN, the plaintiff, called as a witness in his own behalf, testified:

That he was an alien, but resided in Buffalo, N. Y.

The witness produced a statement made from his books which he verified as correct of the amount of shipments by him over the Erie road, and the freight paid thereon under his contracts for years as follows:

For the year 1882, 13,803 tons. Freight paid, $75,427.87.
For the year 1883, 13,154 tons. Freight paid, $93,704.82.
For the year 1884, 10,758 tons. Freight paid, $83,639.51.
For the year 1885, 6,080 tons. Freight paid, $48,100.78.

The attention of the witness then being called to Schedules A and B annexed to the complaint, he testified that Schedules A and B were correct statements of what they purport to contain in respect to his shipments over the Erie road and its connecting lines under his contract during the years respectively 1884 and 1885; that they do not embrace his entire shipments, but only such of them in respect to which his claims have not been paid.

The witness further testified that Schedule A referred to,
130 contained a correct account of the date of arrival in Jersey City, car number, way-bill number, the feet, the shippers' weight, the railroad weight, and the freight paid on the several shipments mentioned therein, and also the rate agreed upon with the company for the respective dates mentioned.

The witness also testified that Schedule B referred to contains a correct account of the date of arrival in Jersey City, the car number, the way-bill number, the feet, the shippers' weight, the railroad weight and the freight paid, together with the rate agreed upon be-

tween him and the company at the times mentioned. The statement in Schedules A and B as to the expenses actually paid by me for unloading cars at Weehawken at the time stated, is also correct. Up to the time that Mr. Vilas left the road; the rates were agreed upon between himself and me; after Mr. Vilas left the rates were computed by Mr. Vaillant who succeeded Mr. Vilas.

He further testified as follows: I remember receiving notice from Mr. Vilas toward the end of the year 1884, that they were abrogating all contracts; I don't remember the actual receipt of that letter, but I remember receiving notice that my contract was abrogated. After that I came to New York, in January. I had written Mr. Vilas a number of times without satisfaction, and in January I came to New York and arranged the business with Mr. Vilas. Prior to January I had worked it up, and had written the Erie road giving them so many days to make up their mind, and notified Mr. Vilas. I came to New York with a gentleman connected with the Grand Trunk and Lackawanna roads and the fast-freight lines operating these roads. These gentlemen were authorized to make contracts for a year or two—not for a single year, but extending over a period of years. I went to Mr. Vilas' office in New York, and told him I should require an answer on Saturday following; this was on a Thursday in January. I told him I should require an answer on the Saturday following, whether the Erie road intended
131 to continue my contract from the first of January, 1885, until the 31st of December, 1885, the same as in 1884, and to pay my rebates and claims during the period of suspension or abrogation from November 15th to December 31, 1884, and if they didn't do so when I came again on Saturday, I should say goodbye. I had already men who were waiting to make a fresh contract. These men were the representatives of these other roads; one of them came with me, and the other was in New York at the time. I had negotiations all closed up with them, and I told Mr. Vilas exactly the situation. This was on a Thursday, because on Saturday I met these men at half past twelve at Exchange place, New York. Then I went on Saturday to Mr. Vilas' office, and asked him, "Have you seen Mr. King?" Says I, "What is the decision that has been arrived at?" He said, "I have seen Mr. King and placed the matter before him. I will go and see him right now, if you will wait." I said, "I will." Mr. Vilas went out of his room, and I don't know where he went, but I presume to Mr. King, and he was gone about fifteen minutes, and came back and said, "The contract is renewed; your overcharge claim for 1884 will be paid." I said, "Is my contract renewed in its entirety in every particular?" He said, "In every particular; you can go ahead just as you have heretofore." It was renewed for the year 1885. I said, "I haven't got an annual pass as part of the agreement; I want to go to Buffalo tonight." And he went out, and came back and said that Mr. King hadn't any passes, but he brought me Mr. King's special pass. I wanted to go by the St. Louis limited, and a regular pass wouldn't do; it must be an annual or a special pass, and it was the first one that was issued; I remember it was No. 1; and that was the clinch-

ing of the contract. That pass was signed by Mr. King with my name on it. I had no personal communication with Mr. King in 1884, or in 1885—none at all. Prior to January, 1885, the arrangement that was in force between me and the
132 Erie Company, and upon which the business was actually done and settled for, was as follows: The company were to furnish me facilities at or near Jersey City for handling property at a minimum price. The facilities were to be such that the vessels could be taken to the berth or dock furnished by the Erie Company and loaded at the dock; we agreed to put the property on board ship. The Erie Company agreed to protect me on rates as against all competitors, namely, shippers over other lines. That when I discovered lower rates than those which they were granting me were being made by other competing lines, I would notify the Erie Company, they would investigate it, and, if found correct, they made my rates accordingly. The rates from special points—from Marion south to Cincinnati, from Ohio River points tributary to Marion, Ashland, Pomeroy, Ironton and Portsmouth, were provided for by a fixed annual summer and winter rate; that had been in force for several years, and was renewed each year, and in 1885 my contract was to cover that renewal. The lighterage charge was three cents per hundred; taking the delivery of property, as I did, in Jersey City, there was no lighterage required, and the lighterage charge of three cents was to be deducted or rebated to me; and if the Erie Company could not furnish me with dock room in Jersey City at which to load my vessel, they were to put my property alongside the vessels in New York harbor, and in order to do so they were to furnish a lighter, but we loaded the lighters and unloaded them, and all the labor at Jersey City after the logs or property were unloaded from the cars was done by me. Shipments made by others, which were quite a number, were usually, and in fact always in going over the Erie railway, made on what we termed through bills of lading issued by connecting lines of the Erie road, such foreign freight, whether logs or black walnut lumber, were stored on the cars till the vessel or steamer was ready to take it on board; and when ordered by the steamer, the cars were unloaded
133 by the Erie Company on the lighter, and by the lighter to the steamer. The Erie Company was to treat my property in the same manner as property sent on a through bill of lading. The company unloaded my property. Shortly after we moved from pier 10 Mr. Hoffman, the local agent of the Erie, applied to me to unload the cars for him, saying their men were busy and that it was expensive sending to Weehawken, and if we unloaded and kept an account of the charge, they would arrange it with us. We were saving them an average of forty to fifty per cent., and we continued to do so until December 31, 1885. We rendered our account every three months—I think every three months—and were paid.

The rates which are charged, as agreed in the schedules annexed to the complaint for the years 1884 and 1885, not yet settled for, are the same rates upon which previous shipments and bills had

been adjusted, so far as respects those from Cincinnati, Ironton, Ashland and Portsmouth. The rates from Chicago and East St. Louis were liable to variations from time to time, but as noted in the schedules they are correct as agreed upon The agreement as to these rates was made with Vilas while he was there, except, I believe, an East St. Louis rate of 27½ cents which I made with Mr. Vaillant, which rate was subject to abrogation on sixty days' notice, which notice has never been given. This was the only rate changed by Mr. Vaillant from those agreed upon by Mr. Vilas.

The defendant company, on request of the plaintiff, here produced bills and statements of plaintiff's claim for rebates and allowances for years 1884 and 1885, which had been paid and settled by the defendant company, for the purpose of showing conformity between the plaintiff's claims in this suit and those so settled and paid by defendant company as respects rebates, weights, drawbacks and overcharges, and expenses of unloading; and it was noted on the record that these payments and settlements conformed as to agreed rates allowed with the agreed rates testified to and as are
134 claimed by him in respect to his unsettled bills in the schedules annexed to the complaint.

I kept myself informed about rates that were being charged by other lines to my competitors, and the rates given to me from competing points were the same as those. I do not know anything about the facilities furnished by other lines, nor as to their method of weights. The net result to me, as far as the rates were concerned, was about the same as to my competitors on other lines. If these terms had not been allowed me by the Erie Company I would have left them, as I did on the first of January, 1886. I have been paid in full by the Erie Company all my claims for drawbacks and overcharges, three cents a hundred pounds, and unloading expense of shipments for the year 1882, and also for the year 1883; also on shipments during the year 1884, except those mentioned in Schedule A, attached to the complaint. These payments were made upon statements substantially similar to those in the schedules attached to the complaint; the statements on which this suit was brought were rendered to the Erie Company in substantially the shape in which they appear in the schedules of the complaint, and give as full, complete and definite information as to my claim as those which were paid by that company during the years mentioned. My accounts for shipments of the year 1884, that are still unpaid, as appear in Schedule A, were presented to the company for payment before the 1st of March, 1885, and those for 1885, were presented before the 1st of March, 1886. The reason for using shippers' weights instead of billed railroad weights, was to overcome water competition. This arrangement was made in 1873, to induce me to withdraw my shipments from water routes, and send them over the Erie road.

Being cross-examined by defendant's counsel, the witness testified as follows:

135 This agreement was first made in August, 1882, and then it was renewed after that in each succeeding January, for a year; that included the same arrangements about weights and lighterage in every particular. That agreement was binding for that year; I always kept it; I considered it so, and I kept it up to the last day of 1885. There was no provision giving me a right to abrogate it during the year; it was made for the entire year up to December 31st. The arrangement was a secret—confidential one; we don't generally tell our business; I never did. It was not a tariff arrangement; it was a contract between myself and the Erie Company. I have no doubt that I received a notice in November, 1884, that all special contracts were abrogated. I am well aware that such a notice was issued. This question of weights, I have already explained, was made to meet the water competition on similar property. We had several tests made and those weights were estimated; they were made as about fair on the average, and they are; they were made upon the theory that it was a fair method of computing rates both for shipper and railroad. The arrangement was made in 1873; I don't know whether it was made for anybody else except me. I was only working for myself. I had some negotiations with Mr. Vilas in the early part of 1885 about the renewal of my contract. I came to see him on a Thur day; I cannot recollect the date. The reason I recollect Thursday is perhaps peculiar; but Mr. Moore came down here specially, and we went home on a Saturday night, he going through and I remaining over at Buffalo on Sunday morning; I couldn't tell the exact date; he tried to get it from his expense account, he keeps an expense account and I don't—but we can always get it from the pass given by Mr. King, it was No. 1, good on the St. Louis Express. You know an ordinary pass would not pass you on that train. The date of that pass will give you the date of that agreement. My interview with Mr. Vilas was subsequent to the writing of my letter
136 dated January 22, 1885; it must have been subsequent to that; I had said something to Mr. Vilas about renewing the contract before that, but he did not reach the point then of agreeing to anything definite. I had seen him several times between November 30, 1884, prior to this Thursday that I have spoken of, and the date of the renewal of this contract; but they were still holding very firm, and not disposed to do anything, and at Mr. Vilas' request I held on; I did not commit myself to any other road for 1885, and I continued with the Erie up to the time I saw Mr. Vilas. But something had to be done, and I gave Mr. Vilas notice that I would have to arrange the whole matter in Buffalo with these other roads, I had two arrangements, one with the Lackawanna and one with the West Shore, and I preferred the Lackawanna, as the West Shore looked very much as if it would not be able to carry out the contract, and we came down here prepared to make this arrangement and gave Mr. Vilas two days' notice. That was on this

Thursday that I have spoken of. Mr. Vilas said he would see Mr. King, and have the matter decided. Then I came around on Saturday, two days afterwards, and saw Mr. Vilas again. He then said "I have seen Mr. King; I have not got his decision, but if you will wait a moment I will go up and get it." I told him I must have it, because the other parties were waiting for me at Exchange place, and I had to be there at noon or near then. Mr. Vilas then went out of his room—where he went to I do not know, of course, but he came back and told me that Mr. King ordered my contract renewed for the year 1885. I asked him whether it was renewed in every particular, and whether the renewal included the period of suspension after the abrogation of the contracts ordered by the trunk lines, and he said it was renewed in every particular, that it included the period of suspension and my overcharge accounts would all be paid at once. I then asked him for a pass, and got it;
137 that was part of the contract. The next time I was in New York they gave me my annual pass.

Q. After this time did not you have a great many negotiations with Mr. Vaillant about your contract?

A. Mr. Vaillant did not come into sight until some time in May.

Q. Well, after May?

A. That was three or four or five months after that. Yes, I had negotiations with him, with Mr. Vaillant, or rather had some correspondence with Mr. Vaillant.

Q. Did you have any through Mr. Felton?

A. Yes, I met Mr. Felton once in my office in Buffalo. He called on me.

Q. Were those all with reference to your contract?

A. Mr. Felton's visit was in reference to a five-year contract proposed for Riverton or Kentucky business. He said he was willing to make an annual contract, the same as the terms of that already with the road. But he could not make a five-year contract without submitting it to the board of directors, but an annual contract he could make at once, and he was ready to do so.

Q. That was something outside of your other contract?

A. Yes; I wanted a five-year contract instead of an annual contract.

Q. If Mr. Vilas under Mr. King's authority renewed your contract in 1885, why were you negotiating with Mr. Felton about it afterwards, and Mr. Vaillant?

A. I did not negotiate at all, sir. I demanded that my contract should be carried out. They showed a disposition not to carry it out. They never gave me notice the contract was abrogated. They had continually referred to my having the contract. The terms provided for certain weights from certain points. Mr. Vaillant's telegrams I have to that effect. I had a meeting with Mr. Vaillant in Buffalo, I think, in June or July, 1885, and we arranged everything regarding weights. I received a letter from Mr. Foley on that day or about that time, in fact that very morning, asking me

to speak to Mr. Vaillant and Mr. Felton about the weights, so
138 as to make up the overcharges. I spoke to Mr. Vaillant and he said: "I would like to have a little explanation."

Q. Do you remember when that was?

A. Yes; the correspondence will show it exactly. And I put the question to Mr. Vaillant finally, whether I should write to Mr. Foley in answer to his letters to make the weights as heretofore, and Mr. Vaillant said "Yes," and I so answered Mr. Foley, and I don't know what occurred.

Q. Did you get on harmoniously as far as your contract was concerned with Mr. Vaillant after May?

A. Harmoniously? Mr. Vaillant agreed to everything.

Q. Was your contract carried out by Mr. Vaillant as you wanted him to do it?

A. I carried out my contract with the Erie railway, up to December 31, 1885.

Q. Was it carried out by the Erie railway?

A. That remains to be seen; I hope it will be.

Q. You did not get paid—that is true, is it not?

A. They paid part of my claims for 1885.

Q. Some of them they did not pay?

A. Some of them they have not paid yet.

Q. When did you cease your shipments over the Erie road?

A. The first of January, 1886?

Q. Up to that time you shipped all your logs?

A. All that were ready, yes, sir; all that belonged to the Erie railway under my agreement. Some shipments that I had were geographically away from the Erie railway, and were in no sense included in my agreement.

Q. You say at the time of this interview with Mr. Vilas you had made arrangements with another line to make them take your business on the same terms?

A. I had made more favorable terms. I have more favorable terms now than I ever had with the Erie.

Q. Were the rates better?

A. Yes, sir.

Q. Were you to get the same facilities?

A. Better facilities.

Q. Were you to get the three cents a hundred pounds?

A. Yes, sir.

139 Q. And you were to have the lighterage done for you in addition?

A. No, sir; the Erie railway never did any lighterage.

Q. They furnished a lighter for you?

A. No, sir; they furnished a berth for the vessel.

Q. Who furnished the lighter?

A. I don't know. The Erie road agreed to furnish berths for my vessel or to put the property alongside the vessels.

Q. How did they put it alongside the vessels?

A. By their own means.

Q. Did they not use a lighter for it?

was from it. From July, 1883, to May, 1885, the total actual weight of his shipments was 9,820 tons; in round figures 10,000 tons; and the total weight as reduced by his allowances of shippers' weight, was 7,965 tons. The revenue per ton per mile that accrued to the Erie Company from that business averaged $\frac{31}{100}$ths of a cent, but the greater portion of it that came from Salamanca averaged $\frac{24}{100}$ths of a cent, less than a quarter of a cent per ton per mile.

Q. State whether this business of Mr. Brown's which gave an average revenue of $\frac{31}{100}$ths cents per ton per mile for the shipments that came by Buffalo, and $\frac{24}{100}$ths cents per ton per mile on those coming by Salamanca, paid the Erie Company a revenue equal to the cost of its transportation.

Objected to by plaintiff's counsel as immaterial. Which objection was sustained by the referee; to which ruling of the referee the defendant then and there excepted.

Q. Can you state by looking at the annual report of the Erie Company for the years 1884 and 1885, what the actual average cost of transportation was during those years on all kinds of freight?

Same objection, ruling and exception.

Q. Was the revenue derived from Mr. Brown's shipments during the years 1884 and 1885, less than the actual cost of its transportation?

Same objection, ruling and exception.

143 —. After I became connected with the defendant company I had negotiations and interviews with Mr. Brown in reference to his alleged contract, and made an investigation of the records of the company to find out whether there was any such contract recorded. Among other records I examined Mr. Vilas' special rate book. That is all I could find. In that book all I could find about Mr. Brown's arrangement was a memorandum made in 1882, giving rates from certain points—Portsmouth and so on.

DEFENDANT'S EXHIBIT 1. July 5, 1888.

("Copy.")

Arrangement made verbally, this date, between (in this office)
ANDREW BROWN, *Buffalo.*
G. G. COCHRAN,
N. Y., P. & O. R. R.
R. C. VILAS,
N. Y., L. E. & W. R. R.

From	To
Portsmouth, Cincinnati and all points on N. Y., P. & O. R. R. and on business originating at C. H. & D. stations between Dayton and Cincinnati.	New York 20c. per 100 lbs. in the summer, or April 1st to November 1st, and 25c. per 100 lbs. in the winter, or November 1st to April 1st.

Logs.

Mr. Cochran has copy.

That is all I could find in the records of the Erie railroad with reference to Mr. Brown's arrangements; and I investigated all the freight offices. I searched everything in the offices where a thing like that would likely be. I did not look through the bills rendered and paid, nor the correspondence. I made inquiry of the different freight offices of the company, but could not get any information; nobody seemed to know. Mr. Brown applied to me for a
144 special rate from East St. Louis during the first period, and I gave him a special rate. I think I also gave him a special rate from Cairo. I never renewed the contract which Mr. Brown claims for the year 1885.

Q. Did you ever agree with Mr. Brown that he should have his allowance of weights or lighterage, or for unloading at Weehawken?

A. I had a general talk with Mr. Brown in regard to his contract. I knew he had a contract with the Erie, of course; but it was all based on my investigating the different points. I had a number of interviews with him on the subject, I think.

Q. Did you ever agree to make these weight allowances and lighterage allowances and allowances for unloading at Weehawken?

A. Not positively; no, sir.

Q. How long did your negotiations and interviews with Mr. Brown continue?

A. I think from about the time, within a few days after, I took hold there along in August when we finally decided. My recollection is it was about the middle of August, somewhere along there.

Q. 1885?

A. Yes. The substance of the last conversation with Mr. Brown was that we declined to carry out his alleged contract.

Q. After that did Mr. Brown discontinue his business with the Erie road?

A. I never heard anything more from him.

Q. Can you state whether or not he did discontinue his business after that time?

A. Yes, sir; I think he did. He may have made some odd shipments during the balance of that year to fill out a lot—something like that; but on general principles he discontinued his business. I never heard any more from him after the final interview that I can recollect of now.

Q. If he had continued shipping over your road as before, you would have heard of it?

A. Naturally; yes, sir.

145 On cross-examination the witness, VAILLANT, testified as follows:

Q. Which of these items or allowances in Mr. Brown's contract, is it, which you have never known to be granted to any other shipper?

Q. The schedules which Mr. Brown has annexed to his complaint were submitted to you for examination?

A. Which do you mean?

Q. The list of shipments made by him.

A. I have seen them; yes.

Q. Was it not upon information obtained from you that many of the statements were made in the answer?

A. I don't know personally that they were correct.

Q. It was the result of your investigation on the subject?

A. Yes. That list of shipments is correct, the dates and number of cars, and the general information.

148 Q. I observe in Schedule B, which is shipments of 1885, that in bill No. 571, twenty-two out of twenty-six of the shipments were after the middle of August?

A. I think those statements are based on the arriving dates, I might have some trouble to locate them.

Q. I observe in 574, the next bill, they were all after the middle of August and beginning as late as December 15th?

A. I did not look over the details of the dates.

Q. They are all after the middle of August and beginning as late as December 15, 1885. In No. 567 more than half were after the middle of August. In fact, all but eight are after the middle of August and running down to the end of November. In bill No. 569 all are after the middle of August, being the latter half of September. In No. 573 all are after the middle of August. In No. 558 more than half are after the middle of August and running into November. In bill No. 562 two out of three are after the middle of August, and some of those of 564, the majority of 565, and all of 570. Now, in view of that do you still say that he discontinued shipments?

A. All that I can explain about it is this: If everything goes smooth and no claims are made, no complaint, we don't hear anything about the goods unless we look it up for information.

Q. If these schedules are correct, as they are admitted in the answer to be, you are mistaken in saying that he discontinued shipments after the middle of August?

A. Yes. That was my impression I said, because I heard nothing from Mr. Brown.

Q. You made an examination from what the company had been settling with Mr. Brown for?

A. Yes.

Q. That is, bills up to the time you came in?

A. Yes.

Q. And don't you know that the rates as charged in these schedules as the agreed rates are exactly what they had been set-

149 tling for on the same articles over the same route?

A. I couldn't say; I would not swear to that. I did not examine the details. My examination was simply general.

Q. You looked at the rates?

A. Yes, sir; I glanced at those.

Q. Did you find any discrepancy?

A. I did not check them off personally.

Q. Did you find any discrepancy between the rates claimed in those schedules and the rates which they settled with him for in 1884 and up to your coming in 1885?

A. I did not look to see.

Q. Do you mean to say that those are not Mr. Brown's agreed rates as they stood before you came in?

A. No, sir; I do not.

Q. Or that they are not rates for which he was settled with up to your coming in?

A. I couldn't say.

Q. And can you deny that these rates set forth in these schedules as the agreed rates are the very rates which were in force while you were there up to the middle of August?

A. I can't say from memory.

Q. Will you look at the agreed rates stated in Schedule B and state whether or not you understood them to be those in force up to the middle of August, 1885, up to your last conversation with Brown in the middle of August, 1885?

A. I couldn't say, sir.

Q. Can you say they were not?

A. No, sir; I cannot.

Q. Could you say as to any one of them that it was not?

A. I couldn't say without examination.

Q. You have undertaken to give a statement of the substance of the last conversation that you had with Mr. Brown in the middle of August. Can you fix the date?

A. No.

Q. Did Mr. Brown come there by appointment?

A. I can't say.

Q. How long was he there?

A. I can't say.

Q. What did he say when he came in?

A. I don't recollect.

Q. What did you say?

A. I don't recollect.

150 Q. State anything you said in the course of your conversation.

A. From the result, my impression is that I told Mr. Brown we would not carry out the contract he claimed.

Q. From what result?

A. From the result of his leaving us and going off mad, as you might say.

Q. I understood you to say that your attention was never drawn to the subject after that meeting?

A. No, sir; I never heard of it — all.

Q. Now you say from what occurred, to which your attention was never brought, you conclude that at this conversation you told him that you would not carry out the contract?

A. Yes; it was from the general result. He never visited the

office again, and I never had another letter from him. I don't remember having an interview later than that.

Q. Do you say that you said to him that you would not carry out the contract?

A. That is my impression.

Q. That is what you think you said, that you would not carry out the contract?

—. Yes—the contract he alleged he had.

Q. He did allege there was a contract?

A. That was the general course of our conversation.

Q. And he had been alleging that since May, had he not?

A. Yes.

Q. And the result of all your talk and correspondence with him was your telling him in your last conversation, in the middle of August, that you would not carry out the contract?

A. Yes, as he claimed.

Q. Did you, in any conversation, deny that the contract was as he claimed it?

A. I don't think I did.

Q. Did anybody, on the part of the Erie railway, to your knowledge, up to the time when the company said they would not carry it out, claim or pretend that the contract was not as he claimed it to be?

A. I don't know.

Q. Mr. King did not, did he?

A. I don't know anything about that.

151 Q. Mr. King did not pretend to you in any conversation that the contract was not as Mr. Brown claimed it to be?

A. I don't think I ever had any words with Mr. King on the subject that I recollect of.

Q. Practically, you never did?

A. Never what?

Q. You never claimed that the contract was not as Mr. Brown claimed it to be?

A. I don't think I ever expressed any opinion.

Q. You claimed to Mr. Brown that the company had not made such a contract with him as he claimed?

A. I don't think in that particular feature of it it was ever discussed.

Q. No such question was ever raised by the company?

A. I don't recollect.

Q. The question that you finally determined was whether the company would continue to carry it out?

A. As he claimed it; yes, sir.

Q. Finally, you did tell him in the middle of August that they would not?

A. Yes, sir; about that time.

Q. But you don't recollect the language in which you told him?

A. No, sir.

The witness here produces a letter, dated the 25th of July, 1885, written to witness by the plaintiff, as follows:

PLAINTIFF'S EXHIBIT X.

BUFFALO, N. Y., *July* 25, 1885.

George H. Vaillant, Esq., freight-traffic manager, N. Y.

DEAR SIR: Referring to our conversation had last week, I thought it might be best to enumerate the different headings which constitute the contract or contracts now existing between your company and myself, and to give the reasons for making the same.

First.—Weights of timber, plank, lumber and staves.

152 Twelve years ago when I first commenced shipping over the Erie railway (in August, 1873), the usual plan of shipment was by water route from the West to New York, and all freights upon lake and canal were calculated by measurement; and in order to divert my business from the water to rail an agreement was entered into with me by the following railroads, to wit: the Erie railway, the Grand Trunk railway, the Lake Shore and Michigan Southern railway, the Cleveland, Columbus, Cincinnati and Indianapolis railway, the Cincinnati, Hamilton and Dayton railway, the Atlantic and Great Western railway (now the N. Y., P. & O. railway), which provided that my measurement of walnut logs, &c., should be taken as the basis of ascertaining weights from which freights were to be paid. The weights of walnut logs to be 6¼ pounds per foot; oak logs, 7 pounds per foot; oak plank, 5 pounds per foot, and poplar plank 3½ pounds per foot. This system has been in force since August, 1873, until the present time, and all overcharge claims made by me have been promptly settled by the railroads, parties to the agreement.

Second.—Rates.

I judge that no explanation is required regarding rates, as you conceded the rates claimed by me to be my contract rates.

Third.—Docks.

In receiving logs and lumber in New York by canal-boat, it was usual to order the canal-boat alongside the vessel to discharge her cargo, arrangements being made in the charter for ample time to unload. It was necessary for the railroads to furnish equal facilities, and as in those days free lighterage was not in force, the railroads had to furnish a dock at which to load said vessels directly from the cars in order to get this class of business. The Erie Railway Company furnished a dock at which vessels were loaded up to January, 1882, when the dock room available for such purpose was

153 taken from them by the D., L. & W. R. R., and Vice-president Harris, acting upon orders received from Mr. Jewett, furnished me with the present dock accommodations on the Delaware and Hudson Canal Co.'s property at Weehawken. The facilities there are inadequate to admit of handling timber, lumber and staves as expeditiously or as cheaply as could be done with proper facilities, which I had previously provided at my own expense (at a cost of about $10,000) on the dock at Oak Cliff, and at pier No. 10, Long dock, and which were entirely lost to me by the

Erie Company exchanging the Oak Cliff property and losing pier No. 10. There not being sufficient water or room for berthing vessels for loading at the D. & H. Canal Co.'s dock it was arranged by Mr. Jewett, or Mr. Vilas upon Mr. Jewett's order, that as the vessels could not be brought to the dock to load, the Erie Company had to take the property to the vessels, or in other words, had to place the property alongside the vessel at their own expense. It was stipulated that lighters should be loaded at my expense and all labor of moving property to and loading upon lighters has been paid by me according to that stipulation; the Erie Company furnishing the lighter and putting it alongside the vessel at their own expense according to agreement.

Fourth.—Unloading cars at Weehawken.

All property shipped by me and received by me at Weehawken being for export, and similar property shipped by others also intended for export, passing through the foreign freight agent of the road, or indeed any similar property consigned to parties in New York and which is subject to free lighterage, being handled at the expense of the Erie Company, it was thought just by Mr. Vilas and so recommended to Mr. Jewett, who approved the same, that as I had agreed to unload the cars consigned to me after removal of our dock facilities from pier No. 10 to our present location, thereby saving the Erie Co. fully 40 per cent. expenses for unloading said cars, that I should be put upon an equal footing with other
154 shippers of timber, &c., intended for export, and that the Erie Co. would pay me actual cost of unloading, and that they have always done so until recently, but are now six months in arrears although bills have been rendered. After the property is unloaded from the cars, all expenses for handling, rehandling, transferring to and loading upon lighters is borne by me.

Fifth.—Lighterage.

Explanation under the head of docks gives the reason for the Erie Co. furnishing lighters, also states fully that all expense other than the lighter itself is paid by me. As all my property, as already explained, is for export, and according to original agreement I took delivery in Jersey City, thereby saving the Erie Co. lighterage expense of 3 cts. per 100 pounds. It was agreed by all the roads previously enumerated and by the Erie R. R. in particular, that the 3 cts. deducted from through rates should be paid to me and not to the Erie Company, and it has always been so paid to me.

In November, 1884, the Erie Co. notified all shippers that all contracts were abrogated. I felt indignant, but decided to wait a month or so before taking action. About the end of January, 1885, I notified Mr. Vilas, freight-traffic manager, that the Erie Co. had to decide whether they would carry out my contracts as heretofore, for the year 1885, and gave him two days to make up his mind. I had arrangements made with other companies for taking my business on equally favorable terms, in all respects, as those previously in force with the Erie Co. On the second day after notifying Mr. Vilas I called on him and he told me that President King had in-

structed him to renew my entire contract for the year 1885, and that the same should be respected from the 17th of November to that date, or, in other words, during the time of abrogation. There was no misunderstanding as to the terms of renewal, for I asked Mr. Vilas if in every particular my contracts were renewed,
155 and he said yes, go ahead as before. I then called upon the gentlemen connected with the other roads, who were waiting for me, some of them having come to New York specially on my account, and told them that the Erie Co. had renewed my contracts for eighteen eighty-five (1885) and that I intended remaining with them, at least, during this year. These gentlemen, as well as Mr. Vilas, can corroborate what I now state.

Since your accession to office, as freight-traffic manager, numerous telegrams and letters have passed between us. To quote from my letter of May 21, 1885, addressed to you, I say: "Though I shall be glad to continue business with the Erie road, yet if any alterations or revisions of agreements now existing are intended, I most certainly shall withdraw rather than submit. You will oblige me, therefore, by stating plainly your intentions."

On May 25, 1885, I telegraphed you, "I agree with you that a personal interview is necessary. Therefore, will let matters rest until we meet, provided, meanwhile, my present arrangements remain in force."

To which you telegraphed answer on May 25, 1885, as follows: "I have your telegram. You can let matters rest as they are until we meet. Your present arrangements to remain in force with the understanding that our temporary consent to continue the same will not in any way affect the negotiations when I see you."

When we did meet at Buffalo in June, and again in July, you expressed yourself as most anxious to retain my business, and though I stated to you that another road was again urging me to give them my business upon the same terms as I had with the Erie, yet you assured me there was no necessity of changing, that everything was all right, and you understood things now, and when I showed you a letter from General Freight Agent Foley, in which he requested me to see you and Mr. Felton regarding my weights,
156 and asked you whether I should answer Mr. Foley to the effect that my basis of weights heretofore used for making up overcharge vouchers should be continued, you answered yes.

I would say that Mr. Foley was quite right in stating to you that I did the lighterage, for our agreement, as already set forth, certainly provides this service shall be done by me with the exception of the Erie Co. furnishing the lighter in place of the berth for a vessel at dock upon which my property is unloaded, and I really pay more by fifty per cent. for transferring and loading the property upon the lighter, than I would be subjected to if property was delivered to vessel alongside of dock at Weehawken, and I am exceeding my agreement with the Erie Co. by at least five dollars per car so paid by me for this extra labor.

During the time you were assistant general freight agent, and afterwards general freight agent, for the Lake Shore railway, a very

large number of overcharge claims in my favor passed through your hands for approval, and you must certainly have been familiar with all the facts relating to the different causes or sources from which these claims originated. Therefore, I would ask you to treat my claims and contracts now with the same consideration as you did when on the Lake Shore R. R.

As already advised, Mr. R. C. Vilas is quite unwell and at present is at Alexandria bay for the benefit of his health. Upon his return to New York I have no doubt he will call upon President King as you wished, and have the renewal of my contract by Mr. King properly established to your satisfaction. Meanwhile, I hope this letter will enable you to understand more fully the whys and wherefores of my sundry and various contract.

You may consider this letter as official, and please present the same for consideration to Vice-president Felton.

Yours truly, ANDREW BROWN.

157 Q. You remember receiving that letter, I suppose?

A. I have no doubt I received it if it was on our files.

Q. You remember receiving that, you say?

A. Yes.

Q. Do you remember you made no reply to that?

A. I can't say whether I did or not.

Q. You have not made any reply that you recollect of?

A. I don't recollect; I don't know whether I did or not.

Q. Is it not a fact, as stated in this letter, that you had previously in conversation with Mr. Brown, received from him the same statements in substance?

A. I can't say.

Q. Is it not true that in conversation had with him before this letter was received by you, you had stated to Mr. Brown that the rates claimed by him were his contract rates?

A. I never knew he claimed any rates.

Q. You never knew that he claimed any rates?

A. Not particularly from any particular point.

Q. Did you understand that he claimed the rates stated in the bills of lading?

A. No, sir; there was no question of the rates with Mr. Brown; the question was on the other item. We did not discuss them. I did not state *pro* or *con*. that I know of, whether we would carry them out or not.

Q. Do you know that he was rendering bills for rates that he claimed as the agreed rates?

A. I don't know.

Q. Was it not a part of your business to know that?

A. No.

Q. Was it not a fact that you had been passing his bills for rebates or allowances, or whatever you call them, on the Lake Shore road for years before that?

A. In the manner I have stated in my previous statement.

Q. Mr. Brown wrote this letter on the 25th of July, stating what he claimed his contracts were, did he not?

A. I think I received that letter.

158 Q. When you told him in the middle of August that the company would not any longer carry out his contracts, you referred to these contracts mentioned in this letter?

A. I don't say it was the middle of August.

Q. Well, whenever it was?

A. The last conversation I had with him; yes, sir.

Q. You referred to these contracts as claimed, in this letter?

A. Yes.

Q. Who was Mr. Felton, and who was Mr. Foley?

A. Mr. Felton was vice-president, and Mr. Foley was the general freight agent of the Erie.

Q. Did you submit this letter to them as requested by Mr. Brown?

A. I don't recollect whether I did or not.

Q. What did you do with it?

A. I can't say. My recollection is that I filed the letter.

Q. He says in this letter that you might consider it as official, and please to submit it to the vice-president for consideration; did you do that?

A. Very likely; I can't say.

Q. And yet no suggestion was made through you or to your knowledge to Mr. Brown that there was no such contract, and never had been such a contract as he claimed in this letter?

A. I don't recollect any such conversation.

Q. You will observe this letter calls your attention to certain telegraphic communications that passed between you and Mr. Brown?

A. Yes, sir; I heard you read it.

Q. Is that correct?

A. The record will show what the correspondence was.

Q. You would not have received a letter from a business man stating he had telegraphed to you, and you had answered in the very words quoted, and not have replied to it if it were so, would you?

A. I might, under certain circumstances.

Counsel here produces and calls the attention of witness to the two following telegrams, as to the first of which the witness says, "I think that is a telegram which I sent him;" and as to the second, "I would not swear this was my telegram from that; but it reads very much like it."

159 PLAINTIFF'S EXHIBIT Y.

MAY 25, 1885.

Dated Cleveland, O., 25.

To Andrew Brown, 744 Main St.:

I have your telegram. You can let matters rest as they are until we meet; your present arrangements to remain in force, with the

understanding that our temporary consent to continue the same will not in any way affect the negotiations when I see you.

GEO. H. VAILLANT.

PLAINTIFF'S EXHIBIT A 1.

By telegraph from ya.

To A. Brown:

O. M. X.

Respecting the traffic from Riverton, it is impossible for us to make a contract good for five years. We are perfectly willing to put that traffic on a basis that you can work, based on your contracts, other points, but cannot see our way clear for the time you desire. Mr. Felton and myself will be in Bufo. on Wednesday morning next, and will be glad to meet you and talk over all unsettled points; ans. if you will be there.

G. H. VAILLANT.

Q. When you read this letter of July 25th, what, if any, different understanding had you of what the contracts with Mr. Brown then in force were than that stated in the letter?

A. I had not any understanding in the matter at all.

Q. You had no other understanding but this?

A. I did not understand that, even, only from what he told me. There was no record of anything of the kind in our office.

160 Q. There were bills paid and settled that showed just what the present arrangement was, were there not?

A. I can't say.

Q. You now know there were?

A. I don't recollect.

Q. You have said there were this morning?

A. The record will show.

Q. You have said that the record will show that he was made the very allowances which he now claims?

A. I simply referred to what the bills show.

Q. And you have examined them?

A. I can't say that I have.

Q. When you wrote this telegram on the 27th of June and said that you were willing to put the traffic from Riverton on the basis of contracts from other points, what understanding had you as to what his contracts in regard to other points were?

A. I had not any, only a general understanding that he had.

Q. You had a general understanding?

A. That he had some sort of an arrangement as claimed by him, but not according to our record.

Q. Your purpose was to offer him for Riverton the same terms that he was then enjoying from other points?

A. Yes, if I sent it.

Q. And instead of five years, for the same time that he had?

A. No.

Q. You said in your telegram respecting the traffic from Riverton it was impossible to make a contract for five years, but that you were willing to put the traffic from Riverton on the basis of the contracts he had from other points, but you could not see your way clear for the time he desired. Didn't you mean to give him from Riverton the same time he was having from other points?

A. I did not know that he had any time.

Q. But if he did?

A. I can't say what I did think.

Q. When you sent that telegram of May 25, 1885, that was twenty-one days after you came into office. When you telegraphed him then that his present arrangement should remain in
161 force, what did you understand his present arrangement was?

A. I had not any idea, except in a general way, that Mr. Brown had arranged with the Erie.

Q. You had a general understanding that he had arrangements for all his shipments, special arrangements?

A. I do not say special; I know he had an arrangement. He was an Erie shipper.

Q. Did you think he was paying tariff rates?

A. I don't know that I thought that; I can't say.

Q. Whatever the arrangements had been up to that time your purpose was they should continue till changed?

A. The substance of that telegram is I wanted him to continue his business till I could see him.

Q. On the same terms?

A. I don't know about that.

Q. At any meeting that you had with Mr. Brown from the time you came into office on May 4th until your final conversation in August, did you change any term of any of his contracts as they existed?

A. I don't recollect.

Q. You don't recollect any conversation which purported to change any terms of the existing arrangement with him?

A. I don't recollect whether the matter was ever brought up; it may have been or it may not.

Q. When you read the letter of July 25th, of Mr. Brown, you saw by that letter that he claimed that in January the contract, as it stood, was renewed for the entire year 1885, did you not?

A. I believe the letter states that.

Q. By what right did you claim in the middle of the year to nullify that contract by notice that you would not carry out it any longer?

A. I could not find any record of any contract, except as Mr. Brown stated. I didn't understand there was any contract.

Q. You did not understand there was any contract at all?

A. I could not find any record of it.

Q. And it was on that alone that you acted?

A. No.

Q. On what other grounds did you act?

162 A. It was undesirable, and the quicker we got rid of it the better.

Q. That was the real motive and reason?

A. And further than that—I want to correct my statement. When I discovered that we were paying for the lighterage and doing the work ourselves I saw right off it was undesirable. There was no record of that.

Q. Don't you know from your investigation of the company's books that it had been recorded as a rebate allowed to Mr. Brown through 1884 and several previous years?

A. As he having performed the services—which I found he had not.

Q. Where was it allowed to him as having performed the services?

A. On the company's record.

Q. Please produce that record.

A. I don't know exactly where it is.

Q. What record is it?

A. If he was paid the vouchers should show.

Q. It is in these vouchers, is it not?

A. I don't know; I can't say.

Q. Then did you examine the vouchers as settled before you repudiated the contract?

A. Only in a very general way.

Q. Yet you did?

A. I saw them then.

Q. Then you know just how he had been settled with throughout 1884, and up to your time?

A. I knew he had been settled with; but I knew he had not performed the services that he had been settled for.

Q. And you concluded the business would not pay, and so you repudiated the contract?

A. I thought it was irregular and gave it up.

Q. Tell me what services it was that he did not perform and that he got paid for.

A. The lighterage.

Q. You mean that the Erie Company, in order to place his goods on the shipboard, furnished a lighter for him to put the goods on by which it transferred them to the ship?

A. Yes, sir.

Q. I will read from his letter of July 25th, the statement
163 about the lighterage, and will ask you after I have read it to say if it does not truly state the facts as you understand them:

"Explanation under the head of docks gives the reason for the Erie Company furnishing lighters, and also stated fully that all expense, other than the lighter itself, is paid by me. As all my property, as already explained, is for export, and according to original agreement I took delivery in Jersey City, thereby saving the Erie Company lighterage expenses of three cents per one hundred pounds, it was agreed by all the railroads previously enumerated,

and by the Erie in particular, that the three cents deducted from through rates should be paid to me and not to the Erie Company, and it has always been so paid to me."

Is not that a true statement?

A. I don't know anything about it.

Q. Do you know of any fact there stated that is not true?

A. I don't know anything about it. It is merely a statement made by Mr. Brown.

Q. It is stated in regard to this lighterage. Do you dispute it or not?

A. I don't know anything about it.

Q. Do you know anything about the facts of the lighterage?

A. Yes; I know the Erie Company did the work.

Q. I ask you to state what statement contained in what I have just read is false, if any.

A. That the Erie Company made an agreement; I don't know that they did.

Q. I ask you about the way in which the lighterage was done?

A. I can't say; I was not present.

Q. You were not present where? What do you mean?

A. I can't say; I was not present.

Q. You were not present where? What do you mean?

A. You ask me if I knew how the lighterage was done.

164 Q. No. What item of that statement is not correct?

A. I can't say.

Q. Can you say any item of it is not correct?

A. I don't wish to say anything on the subject.

Q. You have got to say something. You can say any part of the statement is false, and if so, what?

A. It is only a statement made by the plaintiff.

Q. I know that. You must state whether you can say any part of it is false.

A. I don't know anything about it. I can't answer because I don't know.

Q. You spoke of the letter and the vouchers which you say you examined.

A. The vouchers speak for themselves.

Q. Did you find that anything in the vouchers deviated from the statement made by Mr. Brown in this letter?

A. I can't say; I don't recollect.

Q. Can you recollect anything that did?

A. I can't recollect it, it is so long since.

Q. On the whole, your conclusion was you would not perform the contract any more?

A. There was nothing on the record about any contract on the part of the Erie, and I decided we had better give it up.

Q. And also that it would not pay?

A. That was one thing.

Q. That was the principal thing?

A. No, sir. I could not substantiate the statement made by Mr. Brown.

Q. You say you could not?

A. I could not find anything about it.

Q. In what respect did the statement made by Mr. Brown which you were trying to substantiate fail to be substantiated by your result of the examination of the vouchers?

A. I couldn't find anybody that knew anything about it.

Q. I am not talking about anybody, but I am talking about the vouchers which you had examined which showed just how he had been settled with up to your time. In what respect did they vary from the statements made here by him?

A. I can't say.

165 Redirect examination by Mr. STEELE:

Q. When you first came in contact with Mr. Brown, I understand you to say you did not understand what the contract was that he claimed?

A. No, sir; I did not.

Q. Can you recollect when it was that you made the investigation after being fully informed by Mr. Brown about it?

A. I think in August, some time previous to my last interview with him.

Q. Look at that memorandum and see if that will refresh your memory (showing the witness a paper).

A. This is a copy of a letter that I wrote.

Q. Say if you can state, if that refreshes your memory as to that.

A. It was August 31st that I wrote this letter.

Q. When you sent this telegram of May 25th to Mr. Brown, which has been put in evidence, saying that his present arrangements were to remain in force, &c., did you intend by that to make any arrangement with Mr. Brown unless he already had one in existence?

A. No, sir; in fact, I don't know what my intention was. He was an Erie shipper and I wanted to keep him in line till I could see how things were. I didn't want to take any action till I could see how things were and till I knew what I was about.

Q. At that time were you advised as to any part of Mr. Brown's contract that he claimed, except his rates?

A. I had a general idea that he had a special rate, but just what it was I could not say in detail.

Q. Is that a telegram that you sent to Mr. Brown on July 6, 1885 (showing the witness a paper)?

A. That reads like a telegram that I sent.

Telegram to Brown from Vaillant, dated July 6, 1885, put in evidence and marked Defendant's Exhibit 3, July 5, 1888, as follows:

JULY 6TH, 1885.

Dated Cleveland, O.

To Andrew Brown:

Referring to the explanation that you gave me in Buffalo
166 relative to the basis of your weights, I have made some examination and would like to have an interview with you on the subject before you send in any further statements, in order that there may be no misunderstanding in our New York office in making statements of your accounts. Please wire me at Chicago on receipt of this, when you expect to be in New York. I am going West this evening and expect to be in New York the fore part of next week to remain some time.

G. H. VAILLANT.

Q. Was it just prior to the date of that telegram that Mr. Brown had explained to you the basis of his weights?
A. I don't recollect.

The following telegram was read in evidence, and marked Plaintiff's Exhibit 4, July 5, 1888:

JULY 7, 1885.

George H. Vaillant, freight-traffic manager, Erie railway, Chicago, Illinois:

Yours sixth received. My contracts which you confirmed provide for weight settlements on present basis. If you contemplate any change, please notify me frankly and promptly. I shall reach New York Friday, seventeenth. Meanwhile ordered shipments suspended. I write you to Chicago.

ANDREW BROWN.

The following telegram, dated July 7, 1885, was read in evidence and marked Plaintiff's Exhibit 4, of this date:

Dated CHICAGO, *July* 7, 1885.

To Andrew Brown, 744 Main street:

Your telegram received. It is not at all necessary for you to suspend shipments. All I want is to have a definite understanding in regard to your weights, and I don't think there would be any trouble
in our reaching a mutually satisfactory conclusion. I wish
167 you could arrange to defer your trip to New York until Friday night. We can then come to a definite understanding and save all further friction. I do not want to ask anything of you but what is perfectly fair and just under all the circumstances. Please answer here.

G. H. VAILLANT.

The following letter was read in evidence and marked Plaintiff's Exhibit 5, of this date:

JULY 7, 1885.

G. H. Vaillant, Esq., fr't-traffic mang., Chicago, Ills.

DEAR SIR: Your telegram of the 6th inst. from Cleveland rec'd, and another today, as per enclosed copy. Acting upon your distinct reply to my direct questions, regarding weights at our meeting on 1st inst., I wrote under date of July 1st, to Mr. Foley, as follows: "Referring to yours of 29th, and mine of yesterday's date, I beg to advise having seen Mr. Vaillant today and he authorized me to say to you that my weights were to be taken as heretofore for ac. claim."—If you have not confirmed this, you place me in a false position with Mr. Foley. I supposed that I had stated very plainly to you, and beyond peradventure of being misunderstood, that I would not consent to any change in my contracts; that rather than submit I would withdraw. I don't like your telegram, and its tenor does not lead to confidence in the stability of any arrangements made with your company at present, unless reduced to writing. Therefore, I have to request an acknowledgment in proper form from you that my contracts will be carried out hereafter during 1885—meanwhile I suspend shipments until hearing from you.

Yours truly, ANDREW BROWN.

168 Q. Did you ever agree with Mr. Brown that the basis of weights which he explained to you in Buffalo, about the first of July, should be allowed him in his settlements as he claimed?

A. No, sir; not positively. It was subject to an investigation.

Q. Were not all your negotiations with Mr. Brown on the basis of there being, as he claimed, in force, a contract for 1885?

A. Yes; it was entirely on his statement. As I said before, I could find no record.

By Mr. CHOATE:

Q. When you received Mr. Brown's letter of July 7th, stating to you explicity that in the previous conversation you had confirmed his contract as to weights, did you understand what he meant by it?

A. I suppose that would mean I confirmed it.

Q. If it was not true, why didn't you answer it?

A. The record will show what the correspondence was.

Q. In any answer that you made to him, did you ever dispute that statement?

A. I can't say.

Q. Did you answer that letter at all?

A. The copies of letters will show that. I couldn't recollect that.

S. M. FELTON, Jr., called as a witness on behalf of the defendant, testified as follows:

I am the first vice-president of The New York, Lake Erie and Western Railroad Company, the defendant in this action; I became first vice-president in November, 1885; previous to that I had been

vice-president, which office I had assumed on January 15th, 1885. As vice-president I was then in charge of the traffic department. I have been in the railroad business fifteen years continuously. I am familiar with the cost of transportation for freight, and the revenue which is necessary in order to make the business profitable. I know from information the sort of cars required for Mr. Brown's business; they are what are known as flat cars.

169 Q. When those flat cars are brought to Jersey City to the seaboard is it practicable to load them on their western journey again?

Mr. CHOATE: How is this material? Is not this the same point already passed on by the referee?

M-. STEELE: I offer to show by Mr. Felton that Mr. Brown's business produced a net revenue which was less than the actual cost of transportation.

Mr. CHOATE: I object to that as immaterial.

This objection was sustained by the referee; to which ruling the defendant then and there duly excepted.

Mr. STEELE: I offer to prove, also, by Mr. Felton what the average cost of transportation of freight on the Erie was during 1884 and 1885, and to show that Mr. Brown's business produced a net revenue less than that.

Same objection, ruling and exception.

Q. Are you familiar with the rebates sometimes allowed shippers as a lighterage charge, three cents a hundred pounds?

A. Yes.

Q. That lighterage charge is an amount paid the line having the terminal facilities for the cost of the terminals, including the lightering, in the course of railroad business?

A. The allowance of three cents for the New York terminal is an agreed allowance on all the railroads to cover the cost of the terminal expense, lighterage, delivery of goods—all the expenses of the terminal. Where the service is performed by the shipper, it has been customary to make that allowance to him as it relieves the railroad company of the expenses covered by it.

Q. From the time you became vice-president in January, 1885, up to the time Mr. Vilas left, did he have any interview with you with reference to Mr. Brown's contract, as he claimed it?

A. Yes.

Q. What was the substance of it, if you can recollect it?

170 A. The conversations, as I recollect them, were largely in the direction of convincing me that Mr. Brown's business was of very great importance, and that it was very important to give him special facilities, give him passes, and give all his traveling men passes, and do everything for him; in fact, I got the impression from the way he spoke that he was the largest shipper on the road outside of the coal corporations.

That is what Mr. Vilas stated. I don't recollect Mr. Vilas ever stating to me subsequent to January, 1885, or at any time, that Mr. Brown's contract had been renewed for the year 1885; he sought

to get me to renew it after January, 1885. I never succeeded in getting fully at the bottom of the arrangement which Mr. Brown claimed until the summer of 1885.

Q. What did you then discover?

Objected to.

The REFEREE: I will take his answer first and see what it is.

A. I discovered Mr. Brown, instead of being a large and important shipper, was a very insignificant one, that his business did not amount finally after these allowances to more than six or seven thousand dollars a year; that out of the gross revenue he paid, nearly one-half was paid back to him in these allowances, making the revenue less than the cost of transportation.

Mr. CHOATE: I move to strike out that answer.

The REFEREE: It may be stricken out.

Mr. STEELE: I take an exception to that ruling.

Q. What did you ascertain with regard to the three cents a hundred pounds that had been allowed to Mr. Brown?

A. As I understood, the vouchers were allowed for services performed; upon investigating the matter I found that the al-
171 lowances for lighterage were paid by the Erie Company, and that they also did the work—or the principal part of it.

By the REFEREE:

Q. That is, they did the unloading?

A. They did the lightering. The putting on board the lighter was done by Mr. Brown, and he was paid for it by voucher; then he was paid the three cents per hundred, which should have covered that, and then the Erie Company did the lighterage, so I was informed. I have no recollection of having ever made any agreement with Mr. Brown that he should be allowed settlements on the basis of his weights, or that he should receive this three cents a hundred pounds, or that he should be paid the cost of unloading at Weehawken; if I had made any such agreement I would recollect it.

Q. Can you state whether or not it was customary, in the transportation of freight like Mr. Brown's, to allow the shipper to pay on shippers' weights as Mr. Brown reckons it, instead of the railroad weights?

Objected to by plaintiff's counsel.

Mr. STEELE: I want to show that this weight allowance was only another form of rebate.

The REFEREE: They don't dispute that.

On cross-examination by plaintiff's counsel, the witness testified as follows:

Q. You say that Mr. Vilas, after January, 1885, sought to get you to renew Mr. Brown's contract?

A. Yes.

Q. Was that seeking on the part of Mr. Vilas in writing?

A. No, sir; not that I recollect. Our offices were immediately adjoining.

Q. Was it in conversation?

A. Yes.

Q. Now state when and where that took place?

172 A. I don't recollect the date, but I remember Mr. Vilas spoke to me a great many times about Mr. Brown's business.

Q. After January, 1885?

A. Yes.

Q. Now fix the date as nearly as you can when he sought to get you to renew it?

A. Our interviews were daily. After the 15th of January, after I came there——

Q. No; I am speaking about February?

A. Well, through February.

Q. After January?

A. Through February all the time I was in New York; I suppose I saw him every day.

Q. Assuming that, I ask you to fix as nearly as you can the date when he did what you call seeking to get you to renew Mr. Brown's contract?

Mr. STEELE: He stated it was a frequent thing.

A. I should say it was brought up during the month of February, that he spoke to me about it, but I could not fix the date.

Q. Once or more?

A. Several times. It was the subject of quite a number — conversations.

Q. In what language did he seek to get you to renew it?

A. Well, in the general language that he used under such circumstances.

Q. Then you know what it was. What was it?

A. He tried to impress me with the importance of making these arrangements with Mr. Brown and retaining his business; that if we didn't do something for Brown his business would go to our competitors.

Q. Did he ask you to renew it?

A. He recommended it. He recommended that Mr. Brown's contract be made, to preserve his arrangements with the Erie, as he did about dozens of people.

Q. Did you refuse to renew it?

A. I declined to do anything about it until I had full information, understanding that Mr. King had declined to renew the contract; I did not feel competent to act under these circumstances.

Q. You did not decline?

A. Yes, sir; I did decline.

173 Q. You did decline?

A. Yes, positively, for the reason that my superior officer

had declined before me to renew it, and I did not have authority to act under the circumstances.

Q. You did nothing about it?

A. I did. I talked about it and I investigated it, and I kept on investigating it.

Q. How was it then that the contract went on unchanged until September when it was repudiated by Mr. Vaillant?

A. I don't understand that to be so. I understand we permitted Brown to go on shipping from time to time without renewing his arrangement, without making any contract with him.

Q. And you charged him what you pleased?

A. No; we were making the current rates for him from time to time. He was working during my administration under no contract with the Erie.

Q. You had no contract with him?

A. It was not necessary.

Q. You didn't have any contract with him?

A. No, sir; we made rates and he took them or not as he pleased. It was not necessary to have a contract with a shipper.

Q. You had no interview with Mr. Brown whatever in February or March?

A. I don't know whether I saw him in February or in March.

Q. You had no interview with him in which you made any agreement with him?

A. I don't recollect making any agreement with him.

Q. Now about this lighterage. You say you found out that the goods were put on a lighter as a means of getting them from the car to the ship?

A. That was my information; yes.

Q. Now who did you understand did the work of taking the goods from the cars and putting them on the dock?

A. Mr. Brown.

Q. Who did you understand did the next work of taking the goods from the dock and carrying them onto the lighter?

A. I don't understand that was done. The logs were un-
174 loaded from the cars onto the dock and then put on the lighter, as I understand it.

Q. Who put the stuff from the dock on the lighter?

A. I understand that Mr. Brown did that.

Q. Who took it from the dock after it had been dumped there and put it on the lighter?

A. It was not necessary that that should be done; the lighter could be laid alongside.

Q. The logs could not move themselves, could they?

A. No; but they could be taken from the cars onto the lighter unless Mr. Brown was waiting to accumulate his shipments.

Q. You said they were taken from the cars and put onto the dock?

A. Yes; that was what the allowances were made for. They might have been on the lighter or on the dock.

Q. Do you know what was the fact?

A. Some were loaded on the lighter and some on the dock, I suppose.

Q. In the case of cars that were unloaded on the dock, who did the work of transferring the merchandise from the dock to the lighter?

A. I don't know. I suppose Mr. Brown did it. That was my understanding. I was not there at the time to see it.

Q. You were never at the dock to see it?

A. I have been at the dock.

Q. But not when that was being done?

A. No; I am not a foreman of laborers.

Q. Don't you know that the tracks were not so laid that it was possible to unload the goods from the car directly into the lighter?

A. No, sir; I don't know; but a derrick might transfer the logs.

Q. What was the distance from the end of the rails to which the cars could come, to the lighter or to the nearest place at which the lighter could come?

A. I never measured it.

Q. You say a derrick would answer the purpose, the distance was so short?

A. A derrick can handle from almost any distance you want.

Q. Did you ever see that done there by derrick?

175 A. I said before I was not there when the work was done.

Q. Who did the work of transferring the goods from the lighter to the ship?

A. I understand that Mr. Brown unloaded the logs. Whether he put them on board the lighter or not at the dock was a question of his own convenience.

Q. I have got by that. I now ask you who you understood did the work of transferring from the lighter to the ship?

A. I suppose that was done by the vessels. They would be apt to put their cargo on board.

Q. The lighter was removed by towage?

A. Yes.

Q. Then the Erie Company did nothing but furnish the lighter and tow it from the dock to the ship. Is that so?

A. Yes, as I understand it.

Q. Did you not furnish yourself a pass for Mr. Brown for the year 1885?

A. I did, sir; on the written request of Mr. Vilas, after a great deal of hesitation which I had in my own mind.

Q. I don't ask you whether you hesitated. I ask you whether you did it?

A. Yes, sir; on his request.

Q. It was for a year?

A. Yes; that is my recollection, that it was an annual pass. I will add that that had nothing to do with his goods in particular, because we were furnishing annual passes to any quantity of our customers.

Q. And to almost everybody else?

A. Yes, sir; very liberal.

By Mr. STEELE:

Q. That annual pass had no connection with any contract which you understood or were advised that Mr. Brown had with the Erie?

A. No, sir; not only that Mr. Vilas' request did not state it was on account of a contract. It simply stated on account of his being a lumber-shipper; and in the same letter right above was a request for a pass for a lumber-shipper who never claimed that he
176 had a contract with the Erie road of any kind; it says local shippers and nothing about lumber-shipper (after referring).

Q. That is a letter of Mr. Vilas'?

A. Yes; it says here S. S. Bullis, E. M. Bond, Andrew Brown, and then in brackets (local shippers).

(Deft's Ex. 2, July 20, 1888.)

JOHN KING, a witness called on behalf of the defendant, testified as follows:

I am president of The New York, Lake Erie and Western Railroad Company, the defendant in this action, and have been such since the first of November, 1884. Prior to becoming president I was assistant president of the road while Mr. Jewett was president, from about August, 1884, up to the time I became president myself. I have been in the railroad business since 1854; upwards of thirty years, and I am familiar with the traffic arrangements of railroads generally.

Q. Will you state what conditions you found existing with respect to the traffic of the Erie road when you became president, and what your policy was in regard to the traffic of the road.

A. When I came here in August, 1884, I took the earliest opportunity to look over the traffic arrangements of the Erie road. Before very long I satisfied myself that they had a great deal of business that was not worth doing, that is, business that did not pay anything. The attention of the traffic officers was directed entirely too much to the through business, which is the least remunerative, to the great neglect of the local business. I found that it was almost impossible to direct the attention of the officers of the company to the value of local business. The further off they could get business and the less rate they could get, seemed to be the kind they most desired. I knew that the general local business on the line of the road was greatly neglected. My general idea of operating the traffic of the road was to avoid taking any business that did not pay of itself

177 I recollect the trunk-line meeting that was held in November, 1884; it was about restoring rates, and we all agreed to restore them. Subsequent to that meeting, in pursuance of these resolutions, I gave directions that rates should be maintained as far as possible. I had interviews with Mr. Vilas on that subject, and I told him to maintain rates; to avoid all this low-price business that we could, and to get the local business in place of it, and I directed him to abrogate all special contracts then existing. My at-

tention was first called to Andrew Brown's business about the latter part of the year, after I became president—I should say November, or towards the first of December.

Q. Did Mr. Vilas say anything to you about it?

A. About that?

Q. Yes; about Mr. Brown's business.

A. I should think he did; yes.

Q. State generally what the course of your conversations was with him about that.

A. The course of the conversations was that Mr. Vilas urged me to make an arrangement with Mr. Brown.

Q. Did you agree to it, or did you decline to do it?

A. I declined to do it about a dozen times.

Q. Did he come to you frequently about that?

A. I should say at least a dozen times. That question was very strong on Mr. Vilas' mind apparently.

Q. He had a great many interviews with you about that particular question?

A. Yes.

Q. And you uniformly declined to renew or make this arrangement with Mr. Brown?

A. Every time.

Q. Did you state to him the reason?

A. Yes.

Q. What was it?

A. I said it was not profitable.

Q. And for that reason you would not renew it?

A. Yes; and another reason was I did not want to make contracts of that kind for a year.

Mr. STEELE: I offer to prove by Mr. King that the net revenue from Mr. Brown's business was less than the actual cost of transportation, and for that reason it was unprofitable, and he declined to renew the contract.

178 Objected to by plaintiff's counsel as immaterial. Which objection was sustained by the referee; to which ruling the defendant then and there duly excepted.

Q. Now, we come down to 1885. Did you, in January, 1885, or at any time, authorize Mr. Vilas to renew Mr. Brown's contract?

A. No.

Q. Will you state whether or not it is true that towards the latter part of January Mr. Vilas came to your office and told you that Mr. Brown was waiting down-stairs in his office (in substance), and that he insisted upon having an answer, as to whether or not his contract was to be renewed or was renewed, and that then you told him to renew the contract?

A. I do not remember any such conversation with Mr. Vilas; I know I never told him to renew the contract at any time—January or at any other time.

Q. You are positive about that?

A. Yes, sir.

Q. Were you ever made aware that the contract had been renewed by Mr. Vilas in January?

A. No, sir.

Q. You did occasionally direct Mr. Vilas to meet cuts in rates about this time?

A. General business?

Q. Yes; rates being made by the other lines?

A. Yes, sir.

Q. But you state positively you never authorized him to renew this contract with Mr. Brown?

A. Positively, yes, sir; I never authorized him.

Q. Is it true that, as a confirmance of that contract, you issued a special pass to Mr. Brown in January, 1885?

A. I don't remember to have issued it.

Q. Is it true that you did that in confirmation of this contract with Mr. Brown?

A. It is not true.

Q. There was a special form of pass that was issued only from your office, was there not?

A. Yes, sir.

Q. Was it customary in issuing those passes for you to sign them, or was it done by your secretary?

179 Q. I signed them very seldom; I don't suppose I signed them once in twenty times—never if the secretary was there.

Q. Did you ever give Mr. Vilas a sweeping authority—general directions to do whatever might be necessary to retain customers?

A. No; not to Mr. Vilas, nor anybody else.

Q. In regard to the issuance of these special passes, was it customary for one of your general officers to go to your secretary and state that you had authorized the issuance of such a pass, and would he then issue it?

A. The secretary can answer that better than I can, but I think he would. He looked after all the passes in my office.

Q. Were you ever aware that any payments were made to Mr. Brown in pursuance of this alleged contract after you became president?

A. Do you mean as to 1885?

Q. As to 1885 or 1884, after you became president?

A. I am not aware of it; I don't recollect it; it would not be brought to me.

Q. You never authorized any such payments?

A. No, sir; not as to any time after I was president. I became president November 1, 1884.

Q. Was it possible for Mr. Vilas, as freight-traffic manager, to authorize such payments being made without the matter being called to your attention?

A. Yes.

Q. When was the payment of his claims first brought to your attention, if you can recollect, generally?

A. It would be a general statement, but I should think at least a

year after I became president; I have no distinct recollection as to time.

Q. Can you remember whether it was while he was still a shipper over the road, or after his relations as a shipper had terminated?

A. I don't know when his relations as a shipper did terminate.

Q. I call your attention to this letter addressed to you by Mr. Brown, dated March 27, 1886. Does that refresh your recollection; does that refresh your memory at all about the time when
180 Mr. Brown's claims, which are now in suit, were first brought to your attention?

A. I should judge it was about this time stated here (referring to letter), but I don't remember; I should judge it was about this time from the tone of that letter that my attention was drawn to it. Other people's attention may have been drawn to it before.

Q. That was about the middle part of 1886?

A. Yes.

Q. When this matter was drawn to your attention—the payment of Mr. Brown's claims—you declined to pay them?

A. Yes.

Q. Were you informed then that Mr. Vilas had claimed that you had authorized him to renew this contract?

A. I think not.

Q. When did you ascertain that Mr. Vilas did claim that you had authorized the renewal of this contract with Mr. Brown?

A. I couldn't say positively, but I think Mr. Atterbury first stated that to me—the nature of this claim of Mr. Brown's—that Mr. Vilas had agreed under my authority; I think that was the first, but I am not very certain about that.

Q. After you were informed of that, did you decline to allow these claims?

A. Yes.

Q. Will you state why?

A. Because I had never agreed to them, and had never authorized anybody else to.

On cross-examination by plaintiff's counsel, the witness testified as follows:

Q. After you became president, did you pay any attention to the details of the traffic business?

A. Oh, yes; I had to do it, I am sorry to say.

Q. To all of it?

A. No; I have reports made to me every day of the business we are doing, and I keep the run of it every day.

Q. When you first became president you fell into that habit, did you not?

A. I started it and gave it all the attention I could.

181 Q. How many such matters come under your attention daily, do you suppose?

A. That depends upon what you mean by "how many such matters." Now, I will state what I do every day. When I get to

the office in the morning I have cards which show all the freight-traffic business that we did the day before.

Q. The names of the shippers?

A. No; the number of car-loads, the amount of business we are doing. That is one duty I perform, or try to. Then Mr. Felton sends me from his office a clip of all important matters referring to traffic and other business as well. Then I see Mr. Felton every day about traffic and other matters, once or oftener, altogether perhaps, on an average of two hours a day; and I keep as well as I can, through him, the run of what we are doing.

Q. You don't undertake to make traffic contracts yourself with shippers, do you?

A. No, sir; I don't undertake to do that; but I undertake to see, before any contract is made lasting any considerable period, to see the nature of it. I don't think any of our people would make a contract for six months, certainly would not for a year, without submitting it to me.

Q. You say that after you became president it was possible for Mr. Vilas to settle Mr. Brown's claims for rebate himself?

A. Yes.

Q. Did you maintain any check upon the general freight manager?

A. Not of that sort, but he gave a voucher that went through the departments.

Q. By the rules of the company was it not required that a voucher should pass inspection and be signed by either the president or vice-president?

A. No, sir.

Q. Don't you know, in fact, it always was so before anybody could get their pay on rebates?

A. It was necessary for the president or some representative to countersign a check. That is a different thing from a voucher.

182 Q. Were not the checks always made fast to the vouchers so that the president or vice-president on signing could see what he was about?

A. Yes, sir.

Q. Look at the papers now before you, produced from the office of the company, and say whether they are vouchers or checks signed by Mr. Felton as vice-president, in 1885, for rebates to Mr. Brown on shipments made after the 1st of January or after the 1st of November (showing the witness papers).

A. Yes; but I call attention to the fact that there is one that is not signed by Mr. Felton, or anybody else, except Mr. Vilas.

Q Don't you understand by the course of the business that a voucher went with the check which was signed by the president or vice-president?

A. I did not sign it.

Q. Don't you understand that by the routine and rules of the business they were gotten up in this way for the signature of the vice-president?

A. I think that all happened after Mr. Felton became vice-presi-

dent; I don't think, before he was vice-president, that Mr. Bowen or Mr. Blanchard signed those papers.

Q. Didn't you understand that this was the shape in which they were gotten up for presentation to the vice-president for his signature?

A. I understood your question to be as to whether the signature of the president was required.

A. I didn't ask you that.

A. Well, I don't know about the vice-president; I don't know what he may have done.

Q. Over the signature of Mr. Felton there is a certification that the above account is correct, that the items therein specified were duly authorized, &c. Don't you understand that to be the regular form of voucher on which rebates were paid?

A. I believe it is, substantially, but I understood you to ask whether I did sign it.

Q. No, sir; I never heard that you did.

A. It is not true if you did. It would take all my time.

Q. You recognize the signature of Mr. Felton?

A. Oh, yes.

183 Mr. CHOATE: We now put these vouchers in evidence.

The vouchers as specified in the list given by the plaintiff to the defendant are considered as in evidence; the missing ones to be furnished by the defendant, if possible.

Here the vouchers presented to the witness were offered in evidence by the plaintiff; they are all in substantially the same form, varying only in details. They were paid at various dates from December 27, 1884, up to September 28, 1885, as shown upon the list following. It appears, however, that all the transportation upon which these payments were made, was completed prior to December, 1884, except in the case of the voucher for $296.93, paid September 28, 1885, which was for the labor of unloading cars at Weehawken for the months of January, February and March, 1885. These vouchers are all in substantially the same form as the Plaintiff's Exhibits A and B. The list is as follows:

List of Oc. Claims Paid to Andrew Brown by N. Y., L. E. & W. R. R. Co. from Dec., '84, to Sept., '85.

Date of payment.				
1884.				
Dec. 2.	503	N. Y., P. & O.	Staves	$859 67
	504	"	Wal't logs	215 74
	505	C. & A.	"	355 06
	509	N. Y., P. & O.	Oak pl'k	768 33
	510	"	Poplar pl'k	291 60
	511	"	"	199 45
	512	Erie	Unloading cars	482 15
	513	Erie & N. Y., P. & O.	Staves	99 94
	514	"	Wal't logs	428 02
	517	"	"	29 90
	519	"	Oak pl'k	439 21
	520	"	Poplar pl'k	299 13
	521	"	"	208 26

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Date of payment.				
1885.				
April 17.	506	½ C., B. & Q.	Wal't logs	28 80
	515	½ C., R. I. & P.	"	20 54
	522	N. Y., P. & O.	Poplar pl'k.	463 92
	523	"	"	154 08
	524	"	Oak pl'k	454 57
	525	"	Staves	91 44
	527	½ C., R. I. & P.	Wal't logs	41 78
	537	Erie & N. Y., P. & O.	Oak pl'k	104 43
May 20.	506	C. & A.	Wal't logs	177 58
	515	Erie & N. Y., P. & O.	"	115 61
	516	"	"	286 57
	526	Erie & N. Y., P. & O.	Wal't logs	370 45
	527	"	"	126 43
	535	" & C. & A.	"	345 98
	535	½ C., R. I. & P.	"	97 10
	536	Erie, N. Y., P. & O. & C. & A.	"	190 75
	536	½ C., B. & Q.	"	7 00
	540	Erie, N. Y., P. & O. & C. & A.	"	241 20
	542	N. Y., P. & O. & Erie	Oak pl'k	948 12
	543	"	Poplar pl'k	575 65
	544	"	Staves	203 75
1885.				
Sept. 28.	541	Erie, 1885	Unloading cars, Jan'y, Feb., M'ch	296 93
				89,219 14

Q. Immediately after the trunk-line meeting did you give orders to Mr. Vilas to abrogate all existing contracts?

A. I think I did.

Q. Without regard to the terms of them?

A. My recollection is not very clear.

Q. Were your orders intended to apply to contracts that were in existence for a term of time not yet expired?

A. Intended to apply to every kind that we could terminate.

Q. But not to a contract not yet expired that was for a term of time?

A. I don't think we would be competent to do that. Would we?

Q. I should think not.

A. I don't think I made any attempt to back out of a contract that the company had agreed to.

185 Q. You did not attempt that? You did not intend that order to apply to a contract which, by its terms, was previously made to run to the 1st of January, 1885?

A. My recollection is that we fixed the 1st of January, 1885, so as not to run afoul of any of those things.

Q. So that there was no attempt or intention on your part of disturbing any contract of Mr. Brown's or anybody else running for the year 1884?

A. I don't call to mind any particular claim of that sort.

Q. This new arrangement of not cutting rates was to begin the 1st of January?

A. Oh, no; not cutting rates, but abrogating contracts.

Q. That was to go in effect on the 1st of January?

A. That is my recollection, but I understand that it was stated in this examination here what it was, and that is better than any recollection of mine.

Mr. STEELE: There is a letter in evidence asking Mr. Vilas if it was understood that after the 1st of January there would be no contracts in force. That is in evidence.

Q. How soon after the 1st of January did you acquiesce in any cutting of rates on the part of the Erie railroad?

A. I don't remember.

Q. Do you remember any duration of time after the 1st of January, 1885, during which you were not already acquiescing in the Erie's cutting rates?

A. I don't recollect the exact date, but I submitted to it just when we knew the other fellows were cutting rates.

Q. Didn't you hear they were cutting rates almost as soon as the contract that they would not cut rates was made?

A. I heard Mr. Vilas say that they cut rates and that the other fellows were saying hard things about him. I am afraid both stories were true.

Q. Then the determination not to cut rates was only momentary?

A. Not entirely. It was a fixed principle that we would maintain the rates as long as the rest.

186 Q. Well, it was very ephemeral, if it was not momentary?

A. That I can't say. It may have been spasmodic.

Q. Can you say there was any time after the 1st of January when you were not cutting rates?

A. Not if Mr. Vilas was there. As long as he was there he was cutting rates. I say that because that is his passion, or was—I don't know how it is now.

Q. How soon or when did you first hear that there was such a man as Mr. Brown, the plaintiff, shipping on the Erie?

A. I should say in the latter part of the year 1884.

Q. Did you suppose that he was then paying what they call tariff rates?

A. I don't know.

Q. Didn't you know perfectly well at that time in 1884 that he had special rates?

A. I knew it from the time Mr. Vilas told me.

Q. When did Mr. Vilas tell you first?

A. I don't know; I said about the latter part of 1884.

Q. Did he tell you what the contract was?

A. Yes, sir.

Q. At that time had you had any examination made of the vouchers on file to see what kind of allowances or rebates were paid?

A. I don't know about the vouchers; I did have an examination made as to the results, and had it made formally.

Q. So that you did know at the end of 1884 what the terms were on which in that year Mr. Brown had been doing business with the company?

A. That was a strong reason why I wouldn't make it in 1885.
Q. Well, you knew that?
A. Yes.
Q. Did never Mr. Vilas say anything to you about the importance of keeping the business of Mr. Brown?
A. Oh, yes, repeatedly.
Q. And he kept saying that, didn't he?
A. Yes.
Q. Did you acquiesce in the desirability of keeping Mr. Brown's business?
A. No.
Q. Did you say anything to Mr. Vilas about it?
A. Yes.

187 Q. You know now, do you not, that up to the middle of August, 1885, at any rate, Mr. Brown continued to ship all his freight by the Erie railroad?
A. I don't know that—August, 1885?
Q. Yes.
A. I don't know about that.
Q. You know now, do you not, he continued to be a considerable shipper by the Erie?
A. No, sir; I do not.
Q. You know that up to August, 1885, he continued to ship goods by the Erie?
A. I do not except what I gathered from that testimony which I read yesterday. I did not know it before. I don't remember.
Q. Do you propose after the first of January, 1885, and until you discovered what you have about the evidence in this case, to say that Mr. Brown did not ship at all in 1885?
A. I did not say that. I said I did not know that he shipped. I don't know whether he did or not.
Q. What was your belief, between January and August, 1885, as to whether he was shipping by the Erie or not?
A. No belief about it.
Q. No particular knowledge as to it?
A. No particular knowledge.
Q. No knowledge that he was shipping by the road?
A. No.
Q. Did you know as to any other shipper whether he was shipping by the road or not?
A. Very few. I never went into that matter of details as to who was shipping. I never examined the manifests; that is the only way I could know.
Q. Were not these payments that were made of rebates reported to you every morning?
A. No; not one of them.
Q. Were no reports made to you of rebates made?
A. At that time, no. At the present time I have a list of rebates, but no names of shippers.
Q. Didn't you make any inquiries?
A. Of what?

Q. Of what rebates were being paid?

A. No.

Q. You did not take any responsibility for it or about it?

A. Yes, a good deal of it.

Q. What responsibility did you take about rebates in 1885?

A. None about those.

188 Q. About no rebates in 1885?

A. I wouldn't say I didn't take any responsibility about any of them. I never heard of them.

Q. Upon whom did the responsibility rest, you knowing nothing about it, for making payments of rebates?

A. Well, I can tell you by explaining the whole system.

Q. I don't want you to explain the whole system. Upon whom did the responsibility rest for making payments of rebates in 1885, you knowing nothing about it?

A. Upon the treasurer. He would pay the money upon the signature of the proper officer, and then as I tried to say the check came to our office. The by-laws of the company required that the president should countersign all checks. I found that duty entirely too onerous when I first went there. In fact, it had never been done before by Mr. Jewett, but in order to get it straight I had the board appoint Mr. Nicholson to countersign these checks for me. Those vouchers all went to him. I never saw them. It is done every day. I never see them.

Q. You do not undertake to intervene in the business at all?

A. No, sir.

Q. The checks are signed in a check book kept by the treasurer?

A. Yes. He signs first and the check is brought up with the voucher, pinned to it or fastened to it in some form. Mr. Nicholson would go through all these vouchers and see that they were properly signed by the officers, adding them up and would countersign the checks; I do that whenever Mr. Nicholson is not in the office, which is very seldom. Sometimes the third vice-president does it. He has the authority also.

Q. Upon these three officers, the vice-president, the treasurer and the freight-traffic manager, the responsibility rested of paying rebates in 1885?

A. Freight rebates?

Q. Yes.

A. Yes.

Q. You did not undertake to interfere with it?

A. No, sir; I could not have done anything else if I did,

189 and I couldn't have done that. It is like signing passes. I don't sign one pass in fifty that is issued in my office.

Q. How soon after the 1st of January did Mr. Vilas begin talking to you about Mr. Brown's contract or about Mr. Brown?

A. He did not wait until the 1st of January; he commenced in November, looking forward to the year 1885.

Q. Do you remember any interview with Mr. Vilas in January—any interview that you can fix in that month?

A. No; I cannot divide between January and December, but all along during that year he talked to me more or less about it.

Q. After you became satisfied that the other companies were cutting rates do you remember an interview with him?

A. He called my attention to it from time to time.

Q. Do you remember an interview with him about Mr. Brown after you became satisfied yourself that the other companies were cutting rates?

A. No; Mr. Brown had nothing to do with that sort of discussion, because what Mr. Vilas wanted was to make the contract for a year. We were not making contracts with David Dows & Co. and all these people for a year.

Q. I call your attention to this, whether after you became satisfied that the other companies were cutting rates you remember any interview with Mr. Vilas about Mr. Brown?

A. No, sir; I don't remember specifically any interview.

Q. After that?

A. No. I remember he talked to me repeatedly about Mr. Brown's case, but as to connecting it with the other matters I don't do that; I don't remember it.

Q. You think you didn't even know that Mr. Brown was shipping by the Erie after January?

A. I do not think I knew. I would naturally take it for granted that my instructions were carried out, and this business was taken away; but I didn't follow it up. I didn't care much about his business.

190 Q. With the exception of your general order to abrogate all existing contracts, did you ever give to Mr. Vilas or to Mr. Vaillant, or anybody else, any instructions to change the terms on which Mr. Brown was doing business with the company?

A. I did in this form: Mr. Vilas asked me repeatedly to make a contract for 1885 as it was in 1884, and I refused.

Q. He wanted you to make a contract for 1885?

A. Yes.

Q. And you said no?

A. I said no.

Q. In 1885 did you ever give him any instructions to change the terms that were allowed to Mr. Brown?

A. I don't remember of having done so.

Q. You now know it to be a fact, do you not, that Mr. Brown continued to do business with the company at least up to the middle of August?

A. I did not know it till I read that testimony.

Q. You know it now?

A. I know it from that testimony.

Q. The testimony of Mr. Vaillant?

A. No: the testimony of Mr. Brown and Mr. Vilas. I don't know whether it is right or not. I don't say that it is not.

Q. Mr. Vaillant has testified this morning that in the middle of August, 1885, or about that time, for the first time he notified Mr. Brown that the company would no longer carry out the contract

with him or take his goods on the terms they had before. Was that within the authority of Mr. Vaillant?

A. I know nothing about that testimony. I would have to look and see what he did. That is the first I heard of it.

Q. Was it within the scope of Mr. Vaillant's power in August, 1885, to notify Mr. Brown that from that time the company would not carry his goods on the same terms that they had carried them up to that time?

A. I would have to see Mr. Vaillant's testimony before answering that. I don't know what he said.

Q. I don't refer to anything he said. My question does
191 not refer to anything he said. I ask you this: Was it within the scope of Mr. Vaillant's powers in August, 1885, to notify Mr. Brown that from that time the company would not carry his goods on the same terms they had carried them up to that time?

A. He would have no authority to make any contract contrary to the one I refused to make.

Q. (Question repeated.)

A. I confess I don't understand the question. I don't know what he is talking about.

Q. It is not at all with reference to anything said by Mr. Vaillant?

A. As I understand the question it is based on something Mr. Vaillant testified to today.

Q. Nothing whatever.

A. Then I should say he had not the power to commit us to any contract previous to the first of August, when there was not any contract.

Q. I didn't ask you about that. Had Mr. Vaillant in August, 1885, the power to change the terms on which a shipper was shipping goods by the Erie?

A. Yes; in a general way.

Q. When you examined into the affairs in 1884, did you find there were a good many contracts on time?

A. I don't remember.

Q. Do you remember finding there were any on time, six months, or a year, or several years?

A. I know there were a great many arrangements; whether they were on time or current, I don't know. They were bad arrangements in my view, but as to whether they run for a year or six months I don't know.

Q. Did you inquire whether they were on time or not?

A. I dare say I did, but I don't remember. I inquired into everything I could think of, and there was a great deal to think of and to inquire into.

Q. Did you make any memoranda of your conversations with Mr. Vilas from day to day?

A. No, sir.

Q. What were your office hours in January, 1885?

192 A. I got there about half past nine and stayed there till four or five.

Q. Busy all the time?

A. Busy as a nailor; very busy.

Q. You could not undertake to state with particularity what you said to everybody during that time?

A. I am not aware of the fact that I did.

Q. Your recollections seems to be of a negative character about conversations with Mr. Vilas?

A. It is very positive as well as negative.

Q. Positively negative?

A. It is very positive by saying no.

Q. I understand you that you did not undertake to charge your mind or inquire who were shipping by the Erie road in 1885?

A. Not all the individuals; no, sir; they were too numerous.

Q. Nor on what terms any particular shipper was shipping?

A. Well, I looked into it from time to time about some of these things; but I did not charge my mind with them.

Q. As a general rule you couldn't charge your mind with that?

A. Not with all of that.

Q. You had to leave that to subordinates?

A. I did. I never would have thought about Brown if Mr. Vilas hadn't put it to me twenty or a dozen time, as I said awhile ago.

Q. All that business you left to your subordinates in a general way?

A. Yes.

Q. You had to?

A. Yes; there were 17,000 fellows on the Erie, and I couldn't look after them all.

Q. That is just what the freight-traffic manager is employed for?

A. Yes.

Q. To arrange terms and see that they are carried out?

A. Yes, but not to make terms when the president tells him not to.

Q. If a shipper wants to ship and to make a general contract, he has to go to the general-traffic manager, wouldn't he, in the ordinary course?

A. Now, he would go to the traffic manager——

Q. I mean then—1884 and 1885.

193 A. There was a difference then, a difference between 1884 and 1885.

Q. Well, 1885?

A. Well, I will tell you. In 1884 they had a vice-president, Mr. Blanchard, whose general duty it was to supervise all those things; but he was very seldom in his office, and when he was there friend Vilas and Blanchard had a battle royal all the time, and he didn't come there much. When Blanchard left in the latter part of November we didn't have any vice-president, and then I don't think Mr. Vaillant or any traffic manager, Mr. Vilas or anybody else, would be justified in making any important arrangement without consulting the vice-president.

Q. Do you know whether they did, in fact?

A. Mr. Vilas can answer that better than I can. My impression is he did not. I think he had a similar row with Mr. Felton, the same that he had with Mr. Blanchard.

The REFEREE: Who established these rates?

Mr. CHOATE: The general freight-traffic manager.

Q. That is so, Mr. King, is it not?

A. Yes. The through tariff is made by all the lines, but not always carried out.

Q. After January, 1885, say between January and September, 1885, did you suppose that any of the regular customers of the Erie were paying the tariff rates from month to month, or week to week?

A. I thought this case was about Mr. Brown.

Q. (Question repeated.)

A. Oh, yes, a great many of them paid tariff rates.

Q. That is not the question.

A. Yes, a great many regular customers.

Q. That were shipping all the time?

A. Yes.

Q. Name any one of them.

A. I don't pretend to name them. That is worse than any question you have put yet in seeking my universal knowledge.

Q. How do you know that any regular customer in 1885
194 paid regular tariff rates.

A. I know that just as I know any general proposition of that sort. Of course, hundreds of them paid the tariff rates.

Q. I mean any regular customers for through business that came from points beyond the Erie road?

A. Why, certainly; a great many men would ship who would not think of asking special rates.

Q. Regularly?

A. Yes; I don't say that they shipped a hundred cars, but they would ship more regularly than big fellows, because the big fellows would go off and get lower rates if they could.

By Mr. STEELE:

Q. If, as a matter of fact, there was no contract in existence with Mr. Brown in the summer of 1885, did Mr. Vaillant have authority to make such a contract or to renew an old one for the year 1885, without authority from you?

A. I should say he had authority to do that without authority from me, except in the case of Brown or some such case that I had decided upon, and he knew it.

Q. Was it customary for a freight-traffic manager to make a contract for a year without consulting with you?

A. No.

Q. I want to call your attention for one moment to these vouchers that were put in evidence. This one, for instance (referring to a voucher), is for labor of unloading cars at Weehawken, and

signed by Mr. Felton. That is not a check attached to that, is it?

A. No, but I suppose they gave him a check. He drew a draft on the treasurer.

Q. He drew on Hoffman, did he not?

A. Yes, and Hoffman endorsed it over to the company.

Q. That was paid by draft, and not by check?

A. Yes.

Q. That draft is not countersigned anywhere by the president or vice-president?

A. No, sir.

Q. (Showing the witness another paper.) I call your attention to this one. Look at that and state whether that is an Erie payment, or whether it is a Rock Island payment. Is it simply a pay-
195 ment charged to the Rock Island?

A. It is a payment by the Erie and charged to Rock Island as their share of this overcharge, according to this paper.

Q. The Rock Island share of the rebate?

A. Yes.

By Mr. CHOATE:

Q. Practically the operation of the business was this, was it not, that the freight-traffic manager made traffic arrangements every day according to his judgment, but they were all subject to the approval or disapproval of the president, isn't that so?

A. That is, when he brought it before him. Do you mean to ask me if all these *these* things have gone on from day to day apparently and were brought to my attention?

Q. They certainly were not brought to your attention beforehand?

A. No.

Q. But he made them, especially the important ones, subject to your approval?

A. Are you speaking now of the present time or 1885?

Q. 1885.

A. The important ones, yes, or the vice-president.

Q. Now, after an arrangement was made it was his duty to report it to you or the vice-president if it amounted to anything?

A. I am quite sure anything of that sort that is under consideration he would consult the president or vice-president about it.

Q. He made it subject to approval; it would be his duty to report?

A. Yes.

Q. Has there been any instance in which, he making such a contract and reporting it to you or the vice-president, that it was disapproved?

A. Yes, but I can't call it to mind.

Q. There were such cases?

A. Yes.

Q. What happened then? Was the shipper notified that it would not be carried out?

A. I don't know. All I know is we would tell them we could not approve of it and they fought it out with the shipper.

196 By Mr. STEELE:

Q. There was not any time since you have been there that a contract was made by the traffic manager running for the period of — year without obtaining your authority?

A. No, sir; I would not approve of a contract for more than a year.

JAMES T. NICHOLSON, a witness called on behalf of the defendant, testified as follows:

I am Mr. King's private secretary, and was such in January, 1885. I always signed Mr. King's name to special passes issued by his office, unless there is some special case where, as a matter of courtesy, he would sign it himself; but I have the power. If any general officer came to me and asked for a pass, saying that Mr. King had authorized it, I would sign it. (Paper shown witness.) That is the stub of a pass issued to Andrew Brown, on the date stated there, at Mr. Vilas' request. It so states on the stub. I cannot state positively whether I signed Mr. King's name to that or whether he signed it, but my impression is that I did, because I signed all these passes and wouldn't trouble him to sign them. It was a matter of compliment when he signed it.

On cross-examination by plaintiff's counsel the witness testified as follows:

It happened that this pass was the only one issued from this book. Mr. King has not issued any special passes except this one from this book. This was the only one that was issued that year, and that was issued to Brown. Trip passes were issued to other officers, but were endorsed, "Not good on the St. Louis limited." I don't remember whether Mr. King directed me to issue this pass, or whether it was requested by Mr. Vilas. Mr. King never repudiated it; he may not have had any idea of it; I issued it under the authority which I had from the president; the date of it is January 17th. I cannot tell where the pass itself is; they are destroyed; they
197 are taken up and destroyed after being checked against the conductor's returns. I tried to get the pass, but I found that is the rule.

Stub of pass put in evidence, and marked Defendant's Exhibit 16 of this date, as follows:

(Form 13.) JAN'Y 27, 1885.

For And. Brown.
Account R. C. V.
From N. Y.
To Buffalo.
Valid to ————
Request of R. C. V.

I.

Issued by the president.

MR. STEELE: I now offer in evidence two statements, one showing shipments stated in the complaint to be in the year 1884, the other showing shipments stated in the complaint to be in the year 1885, showing what the net revenue per ton per mile on each of those shipments was, and what the average revenue from those shipments during the periods 1884 and 1885 was. I offer them for the purpose of showing that the net revenue derived from those shipments was less than the actual cost of transportation.

Objected to by plaintiff's counsel as immaterial; which objection was sustained by the referee; to which ruling the defendant then and there duly excepted.

ROYAL C. VILAS, recalled on behalf of the plaintiff, testified as follows:

While I was freight-traffic manager and Mr. King was president, the agreements or arrangements for rates and rebates were made by me after consultation with my superior officers, Mr. King or Mr. Felton. Until the time of Mr. Felton taking his position I
198 only had Mr. King to confer and consult with. After that I conferred or consulted with Mr. Felton.

Q. In any cases where you made contracts, I suppose in a great majority of cases you made them without first consulting or conferring with Mr. King or Mr. Felton?

A. It would depend on the nature of the contract; under general instructions I would make rates from time to time. I never would make a long-time contract without consultation.

Q. Where you made contracts without consultation what was your habit as to reporting them to the president or the vice-president?

A. I never reported the general making of contract rates where they were simply for the time being. That was almost always done under a general authority, general instructions.

Q. Do you remember any cases where you reported to either the president or the vice-president, contracts for freight that had been made by you, that were disapproved by them or either of them?

Objected to as immaterial. Objection overruled. Exception taken.

A. No.

Q. In your time did any such instances occur?

A. I never, to my knowledge, made an arrangement that was not approved.

Q. You have heard the testimony of Mr. King as to what took place between you and him in December and January, 1884 and 1885. He says in the first place that you urged him to make an arrangement with Mr. Brown. Did you urge him to make an arrangement with Mr. Brown other than to renew the contract?

A. No, sir; I did not urge him very much for that.

Q. He says, in substance, that he refused to you at least a dozen times to authorize the renewal of that contract.

A. I think Mr. King is mistaken about ten times.

Q. What do you mean by that?

199 A. I do not think I went to him about Mr. Brown any more specially than I did about the general business of the company. I went to him immediately after the November agreement of the trunk lines, and kept going to him day by day, bringing him evidences of bad faith on the part of our competitors, with a view to having him give me permission to take care of our customers.

Q. I am talking about Mr. Brown. Did you draw a distinction between ten times to a dozen in your answer just now?

A. Yes.

Q. Did he refuse once or twice to authorize you to renew with Mr. Brown?

A. Yes; he refused to let me make any arrangements.

Q. Any arrangements for time, or what?

A. For time or cut rates with anybody after the meeting in November.

Q. Did he specifically once or twice in the case of Mr. Brown refuse?

A. Yes.

Q. You calling his attention to the Brown contract?

A. Yes.

Q. That, of course, was prior to the date of this pass, which appears to be of the 17th of January?

A. Yes.

Q. Under those refusals of Mr. King what, if anything, passed between you and Mr. Brown?

A. Why, I declined to renew his arrangement, I told him I couldn't do it.

Q. Have you a clear and distinct recollection of what took place on the day that that pass was issued, the 17th of January?

A. I don't know as to the date. I have a distinct recollection of what took place on the day that I had the last talk with Mr. King in reference to Mr. Brown's contract.

Q. Was not that the day the pass was issued?

A. I think it was; but I am not sure. That was a trip pass and obtained on that same day, but whether on that date or not I don't know.

Q. After hearing Mr. King's testimony are you clear in your recollection—it was the last time you talked to him about it, as you and he both said—are you clear in your recollection that he

200 did authorize you to renew the agreement with Mr. Brown for the year 1885?

A. I am; absolutely clear.

Q. And did you in fact so report on that day to Mr. Brown?

A. I did, within five minutes after Mr. King told me.

Q. You urged upon Mr. King between the date of the trunk-line

meeting and the issue of this pass to Mr. Brown, the importance of keeping Mr. Brown's business. What did he reply to that?

A. Nothing special, only that he had made this arrangement with the trunk lines to maintain rates, and he was determined to show to the other trunk lines that the new administration of affairs on the Erie could maintain an agreement and keep its word, and he was going to do it, until he found out he was being cheated by his competitors. That was the only reason given for declining to renew the arrangement.

Q. When you did in fact renew the arrangement with Mr. Brown, did you understand that if it was not renewed he had the other competing lines ready to take it.

Objected to by defendant's counsel as immaterial; which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

A. Certainly, that was what I understood.

Q. You regarded it as important to the Erie Company to keep it?

A. Certainly.

Q. Now, as long as you remained there did you hear any objections from Mr. Felton to the rates which were being allowed to Mr. Brown?

Objected to by defendant's counsel until it is shown that Mr. Felton knew all about it; which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

A. I never talked with Mr. Felton regarding Mr. Andrew Brown's business except to ask Mr. Felton to give me one or two annual passes; I have forgotten which it was.

201 Q. Then he did not object to you to any of Mr. Brown's stock being carried at special rates?

A. He never objected about the rates on Mr. Brown's business. The question of Mr. Brown's business was disposed of.

Q. Mr. King has stated that he never troubled himself as to who were shipping, or what they shipped or at what rates, and he has named the officers who were responsible for that matter, yourself, Mr. Vaillant (your successor) the vice-president and the treasurer. Did you ever hear any complaint from any quarter, from any officer of the company as long as you were there, as to the rates and rebates or allowances made to Mr. Brown, and the settlements made, up to the end of your time?

Objected to by defendant's counsel as immaterial; which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

A. No, sir.

Cross-examination by Mr. STEELE:

Q. Nobody's attention was ever called particularly to it after the time you state you renewed the contract?

A. Attention called to what?

Q. To Mr. Brown's contract.

A. No, sir; I don't remember of discussing it with anybody. It was settled and he renewed his shipments.

Q. You never discussed it with Mr. Felton?

A. No.

Q. Were you not on rather bad terms with Mr. Felton?

A. Not that I know of.

Q. Didn't you dislike his being put over you?

A. No; I disliked his mode of doing business, and that is the reason I left.

Q. That was the reason you resigned?

A. Yes; I could not work with him.

The plaintiff, ANDREW BROWN, was recalled and testified as follows:

202 Q. Two letters have been put in here, one dated in December, 1884, after you got notice of the proposed abrogation of special rates by which you appear to have sent 213 cars by some southern route from a certain point, what have you to say about that?

A. My understanding with the Erie road was that my rates were to be as low as by any other route, otherwise they did not expect the shipment. When I received notice of the abrogation of the contract, the rates from Ashland instead of being 25 cents were 30½ cents. In order to reach Ashland I had to pay a local rate to the Chesapeak- and Ohio road, of, I think at least four or five cents a 100 pounds. This rate added to the through rate from Ashland proposed under the new tariff, was thirty-five and one-half cents, the entire th-ough rate from the point of shipment. The property could not stand that. My engagements with vessels and steamers were such that I had to put property in New York by a given date. Failing to get any satisfaction from the Erie Company, I shipped by the other route at the rate of 29 cents a 100 pounds, through to New York from the point of shipment—about 29 cents.

Q. Was it in view of that notice that this shipment by another line was made by you?

A. Because it was impossible to deliver the property to the Erie railway.

Q. Why?

A. Because my rate was withdrawn; the rate which was specially issued for Ashland was withdrawn.

Q. There was another case of alleged diversion, was there not?

A. That was a washout. In fact there was a general flood out there. The Ohio river washed out the banks and tore away the road to the extent of about 20 miles, and it took them six or more weeks to repair it.

Q. When was that?

A. That was in 1884 some time.

Q. What happened?

A. We were obliged to ship by the southern route. We could not cross the Ohio river.

203 Q. That is, the Erie and its connections were unable to take it?

A. Cut off by the flood.

Q. Is that the circumstance referred to in a letter that has been read on that subject?

A. Yes.

Q. Was there any other case but those two that you have now stated and explained, in which you failed to ship by the Erie?

A. None other where I could deliver; no, sir.

S. M. FELTON, JR., recalled on behalf of the defendant, testified as follows:

(Paper shown witness.) This is a voucher in favor of Andrew Brown for labor of unloading cars at Weehawken, from January 1st to March 31, 1885, for $296.93; that was signed and approved by me. There is nothing in that voucher which would indicate that there was a contract with Mr. Brown for that sort of payment, nor was there in it anything whatever more than the ordinary service that is frequently performed; there is nothing at all unusual in the voucher. (Another voucher shown witness.) This is an overcharge against the Chicago, Rock Island and Pacific railroad for $97.10; this is also approved by me; there is nothing whatever in that voucher to indicate that it was made in pursuance of a contract with the Erie road in favor of Mr. Brown for overcharges of that nature; it is merely paying Mr. Brown a sum authorized by the Rock Island railroad. It is not a payment that eventually is charged to the Erie road in any way; it is an amount advanced by the Erie for the Rock Island; it is the customary way of settling a great many things of that kind. (Another voucher shown witness.) This voucher is in reference to the same shipment as the last one. It covers the rebate by the Erie Company on the same shipment as the voucher previously shown me against the Rock Island road. I did not approve this voucher; it is approved by Mr. R. C. Vilas.

204 Q. In the ordinary course of business of the Erie road is there any reason why two vouchers on the same shipment, one being charged to the Rock Island and one being charged to the Erie road, why the one charged to the Rock Island road should be sent to you for approval, and the one charged to the Erie road not sent to you for approval?

A. I cannot understand this voucher. I was in charge of the traffic department when this voucher was registered in March, 1885, and why on earth the Rock Island voucher should have gone to me for approval and this Erie voucher should have been withheld, I cannot see; it is very singular.

Q. This voucher that I previously showed you for $97.10 against

the Rock Island road, was that approved by Mr. Vilas, who was then still freight-traffic manager of the company?

A. Yes, sir; it bears his signature; there is no doubt about that.

Defendant's counsel produces a merchandise freight classification used for all general freight traffic in effect on the New York, Lake Erie and Western railroad from May 1, 1882, up to December 19, 1885, and reads in evidence:

SECTION 8. All articles in classes A, B and C, must be loaded and unloaded by shipper or consignee. Should such service be performed by the company, an equitable charge will be made for the labor.

On page 16, in the classification, "Lumber in car-loads" class B.

ANDREW BROWN, plaintiff, recalled, testified as follows:

By Mr. ATTERBURY:

Q. Have you ascertained the date that you came to New York, and the date that you left New York when you got this pass?

A. Yes; I came here on the 29th and got the pass on the 31st of January, 1885. That is as near as I can arrive at that.

205 Q. When did you use the pass?

A. The same day it was given to me.

Q. Did you go home?

A. I did.

Q. Was the pass given you on the day that you used it?

A. It was.

Q. Was that the day on which Mr. Vilas told you that your contract would be renewed for the year 1885?

A. Yes.

Q. What day of the week and month was that?

A. January 31, 1885, Saturday.

By Mr. STEELE:

Q. How do you fix that date?

A. By examining an expense account, which satisfied me.

Q. Whose expense account?

A. Mr. Moore's.

Q. Any other way?

A. No; except my recollection. But I verified my recollection or rather strengthened it by looking at that account.

Q. You have no recollection except from that account?

A. Yes; I have a very strong recollection.

Q. As to the date?

A. Yes.

Q. Why didn't you recollect it before?

A. I did recollect it.

Q. You swore positively that you could not recollect the date?

A. I said it was Saturday.

Q. I say date, not the day.

A. No; I could not recollect it then.

Q. The only way you can state this date is from having seen Mr. Moore's expense account?

A. Yes.

Mr. STEELE: I move to have all this evidence in regard to the date stricken out as being hearsay.

The REFEREE: I will allow it to stand for whatever it is worth.

To which ruling of the referee the defendant then and there duly excepted.

206 PLAINTIFF'S EXHIBIT R.

MAY 15, '5.

G. H. Vaillant, Esq., West'n trafc. mangr., Chicago, Ills.

DEAR SIR: I have your telegram t | d—had already been in tphic. correspondence with Mr. Pennington and closed the business from Cairo to N. Y. by an "all around the world" route at 30c. p. 100 lb. rate, good until Nov. 1, '85. This Danville & I. B. & W. N. Y. P. & O. route is something new, cannot you arrange with Mr. Pennington to give the logs to Ohio & Miss. at Vincennes?

St. Louis business requires prompt answer. I am offered 27½c. rate by a road which positively refused to protect this rate by any Erie line, but offers me the choice of West Shore, Lackawanna or Red lines. If the O. & M. and Erie want my log shipments from East St. Louis at 27½ cents rate, good until Nov. 1, '85, they must look sharp because I cannot afford to lose a good chance by other lines.—I am just in receipt of tgm. from Mr. Foley as follows: "I will endeavor to give you answer tomorrow morning regarding rate your logs from East St. Louis."

Please wire me on receipt, or not later than 3 p. m. 16th what you can do regarding East St. Louis shipments.

Yours truly, ANDREW BROWN.

PLAINTIFF'S EXHIBIT S.

New York, Lake Erie & Western Raiload Co.'s telegraph.

5, 18, 1885. Time rec'd, 3.01 p. m.

By telegraph from ya 18.

To A. Brown:

207 Mr. Foley has just handed me your letter of 15th We will make the rate of 27½c. from East St. Louis to New York via O. & M. R'y good to be abrogated upon ten days' notice. Pls. advise when you commence shipments & we will direct the O. & M. people to bill flat.

G. H. VAILLANT.

PLAINTIFF'S EXHIBIT T.

5, 20, 1885.

Dated Cleveland, O., 20.

To Andrew Brown:

Your telegram received on my arrival here; we will make the sixty days' notice as suggested on the logs from East St. Louis.

GEO. H. VAILLANT.

PLAINTIFF'S EXHIBIT U.

MAY 20, '5.

G. H. Vaillant, c. o. G. G. Cochran, gen'l frt. agent, N. Y., P. & O. R'y, Cleveland, Ohio:

If you cannot decide today to make East St. Louis rate good until November first I will accept sixty days' notice of abrogation and order shipments started, when I meet you I think you will extend rate to November first. Please answer today.

ANDREW BROWN.

DEFENDANT'S EXHIBIT P.

NEW YORK, *November 24th*, 1884.

Andrew Brown, Esq., Buffalo, N. Y.

MY DEAR SIR: Your several favors received. Mr. Spencer advises me that he will comply with what you suggest in your communication to him of the 20th inst.

208 As regards the order given in reference to the payment of freight charges at Jersey City, I have taken the matter up with President King this morning. He is cutting off all such lines of credit, but has promised me that he will take the matter up with his finance committee and let me know their decision.

As regards your rates for transportation, it is not our intention to take any action that can be considered unfair or unjust, but I can only say, at this time, that he will carry out our general understanding during this month, but it is absolutely necessary that you come to New York at the earliest possible date, for the purpose of a conference regarding the matter. I am overwhelmed with work but will be glad to see you any time you will come, and will talk the matter over fully with you and try and reach a mutually satisfactory arrangement.

Yours very truly,

(Signed) R. C. VILAS,
BROWN,
Freight-traffic Manager.

DEFENDANT'S EXHIBIT 1.

BUFFALO, N. Y., *Nov.* 17, 1884.

R. C. Vilas, Esq., New York.

MY DEAR SIR: I received enclosed tm. from Mr. Foley. I should hope this will not apply to my shipments from Kentucky via Ashland; if so, it will close that work effectually and this comes doubly hard because getting tired waiting for rain to come to our relief, we are putting down an artesian well, 400–500 feet and expect to start up lively next week, but cannot do so upon a 30½c. rate from

209 Ashland—Virginia & N. Carolina competitors can undersell me and they ship to Baltimore, Norfolk and Newport News. Again—as explained to you, we have been bothered getting out

zant of the uphill work I had in getting permission from C. & O. people to take your cars for New York, loading as against their "Kanawha line" via Charlottesville, Va. & Phila. to New York. Any disturbance of my contract rate at this time, would be most unfair because we have come thro' a protracted drought not yet ended, and have been unable to work our mills since June.

Respecting rates on wal't logs from East St. Louis, Vincennes, Ind'a & Chicago, coming from Kansas, Arkansas, Texas, &c., I expect the rates upon basis of 25c. from Chicago, or if that rate cannot be had, then the classification of logs should be lowered into that of staves, for reasons already fully given you. The markets for timber abroad are very depressed, and even at the rates named, no profit is visible, we are only working to keep our force of men & teams together & supply our regular customers abroad meeting the reduction in prices, and hoping for an improvement.

213

Waiting your reply.

Yours truly, ANDREW BROWN.

DEFENDANT'S EXHIBIT 12. July 5, 1888.

BUFFALO, N. Y., *May* 7, 1885.

R. C. Vilas, Esq., N. Y.

MY DEAR SIR: I rec'd yours of 6, enclosing the letter repasses from Mr. Felton. I wired you asking if you wished me to reply to it. I find that during time of heavy floods last year, in order to keep our freight engag'ts we shipped ab't 170 car-loads by southern route, because no cars p. cross the Ohio river at Ashland for nearly 6 weeks again when the iron-clad order was issued in Nov'r. I susp-nded ship'ts over Erie from the South, & diverted 213 cars, sending them to Newport News. Our aggregate ship'ts for last year were 1,092 cars; and average w't 30,000, making 1,365 cars of 24,000. I hardly think any hard-wood shippers exceed this.

Yours truly, ANDREW BROWN.

The drought which followed the floods in Kentucky last summer compelled me to stop our mills and trains for 4 months. I expect to be in N. Y. ab't 19th, and hope then to see you. Trust you are all quite well. Kind regards.

214 DEFENDANT'S EXHIBIT 13. July 5, 1888.

BUFFALO, N. Y., *May* 9, 1885.

R. C. Vilas, Esq., fr't-traffic mngr., New York.

DEAR SIR: I am sorry to learn that Mr. Felton does not consider the volume of my business sufficiently large to entitle me to two passes over N. Y., P. & O. R'y for Manning and Bousch; my total shipments for 1884, aggregated 1,092 cars of ab't 30,000 lbs. or say 1,365 cars of 12 tons each. Through floods and damage to Scioto Valley track, causing six weeks' suspension of traffic, I was obliged

to divert 170 car-loads in spring of '84 and send them by southern route, and owing to the order abrogating contract rates, issued by the Erie in Nov'r I sent 213 cars more by southern route. This year, if no disappointing causes arise, I hope to ship a larger number of cars than in 1884. The business from south of the Oh o river via Ashland is clear gain to the traffic of the Erie R'y, because no other shipper is allowed to load cars on the C. & O. R'y for shipment to New York by route north of the Ohio river, the C. & O. having a line of their own into N. Y. over Virginia Midland and Peoria r'ds. I have lately sent you several t'g'ms, showing why N. Y., P. & O. passes might secure business, which otherwise I n'd not bother with, I enclose another t'g'm rec'd y'day, this lot 350 logs represents, say 30 car-loads, as already explained I am willing to risk salary & expenses of inspector provided R. R. getting the freight will stand the transportation. I *I* can assure Mr. Felton that I am offered passes to a larger extent than I am asking for on N. Y., P. & O. from competing lines, and as every little helps business in these times, perhaps even such small items as passes may divert a number of cars from your road.

Yours truly, ANDREW BROWN.

215 DEFENDANT'S EXHIBIT 19. July 5, 1888.

CLEVELAND, *May 20th*, '85.

Andrew Brown, Esq., Buffalo, N. Y.

DEAR SIR: Your letter of the 19th received and noted. Will you kindly advise me with whom you have made time contract with the Erie Co. from Chicago, Cincinnati, Portsmouth, Ashland, Ky., Detroit, and also on what basis. I find no record thereof and I would like to have you give me particulars. As it is not the policy of the Erie Co. to make time contracts of any kind, especially for the period you refer to.

Please write me fully.

Yours truly, GEO. H. VAILLANT, *F. T. M.*

P. S.—I wired you this afternoon that we would give you 60 days' notice before we made an advance on the East St. Louis logs.

G. H. V.

DEFENDANT'S EXHIBIT 20. July 5, 1888.

BUFFALO, N. Y., *May* 21, 1885.

Geo. H. Vaillant, Esqr., fr't-traffic man'g'r, Chicago, Ills.

DEAR SIR: Yours 20th inst. rec'd & noted. My agreement or contract with the Erie Co. as to rates from points named is somewhat intricate and can be explained better by personal interview, than by letter, therefore I will wait until I see you, which I hope to do next week here. My rate from Chicago to N. Y. on logs is 25c. p. 100 lb. until Nov. 1st, then it is 30c. until Ap'l 1st.

Yours truly, ANDREW BROWN.

216 DEFENDANT'S EXHIBIT 1. July 20, 1888.

Dated Chicago, 22.

To Andrew Brown, 744 Main St.:

I have your two letters of the twenty-first & note contents; Mr. Foley telegraphs me that he has no record of any contract whatever with you, nor has he any knowledge of any time arrangement, as I said to you before the Erie Company would be very glad to do your business, at the same time I must know what we are doing, & it is for that reason that I have requested that we have a meeting & talk matters over, I shall be in Cleveland Monday & Chicago the balance of the week probably and will be glad to see you at either place.

G. H. VAILLANT.

DEFENDANT'S EXHIBIT A. July 20, '88.

MAY 22, '5.

Geo. H. Vaillant, Esq., fr't-traffic manager, Chicago, Ills.

DEAR SIR: Your t'g'm this date received. My rate from Chicago, Detroit on logs is stave rate instead of lumber
rate 25c. from Chicago, Ap'l 1 to Nov. 1.
30c. " " Nov. 1 to Ap'l 1.
Detroit 78 % of these rates.
From Cincinnati G. W. D. and all points on N. Y. P. & O. R. R. between Cincinnati & Salamanca rate on logs lumber and staves is
20c. from Ap'l 1 to Nov. 1,
25c. from Nov. 1 to Ap'l 1,
in addition to these rates from Cincinnati. I pay on logs, lumber and staves coming from Cinti. per South Shore line P. C. & St. L. the full tariff between Cinti. & Springfield making my rate by S. S. line 22c. & 27c. respectively.

217 From Ashland, Portsmouth and points on Ohio river south of Columbus my rate on lumber, logs and staves,
20c. from Ap'l 1 to Nov. 1,
25c. from Nov. 1 to Ap'l 1,
and I pay full tariff to roads south of Marion from shipping point to Marion—which increases my net rate to 22½c. and 27½c. respectively. At present I could make contract at 19c. on logs, lumber &c. from Ashland, Portsmouth, Ironton &c. by White line to New York and White line will protect the 19c. rate from points of shipment named. I could also make contract for shipment of logs from Chicago to N. Y. at 20c. with 10 days' notice of abrogation and from E. St. Louis 25c. same terms. During the 2 or 3 years these rates named have been contracted with me by the Erie, Grand Trunk, C. & A. &c. I do not think there have been six months' steady adherence to tariff by roads in general, in fact I know there has not been a month of actual enforcement of tariff and during 18 months of the time I could have made temporarily much lower rates than

those granted me on a contract by Erie and so reduced my average of rate below figures named as being my contract rates, but I have not time to do a jobbing business in rates and unless I can feel secure in a fair rate for a period of at least six months, I could not work to advantage—there are many things wh. I could explain personally to you but have not time to write meanwhile until I have the pleasure of meeting you, I think what I have herein stated will suffice to show you that my contract rates are really no very serious detriment to the Erie Co. but rather represent a better average rate than they obtain from transient shippers of same grade. One thing more the Ashland traffic pays the C. & C. a heavy local to Ashland and unless shipped by me the Erie Co. could not enjoy the haul to New York because by special favor Mr. C. W. Smith gen'l manager, C. & O. permits Erie cars to go upon his line
218 for my loading but refuses to bill grade of other shippers by route north of Shad river to New York—the C. & O. having a line of their own over Va. Midland and Penna. road to N. Y. I send copy of this to you c | o Mr. Cochran, Cleveland, O.

Yours truly, ANDREW BROWN.

DEFENDANT'S EXHIBIT B. July 20, '88.

MAY 23, '5.

Edward Foley, Esq., gen'l fr't ag't, New York.

DEAR SIR: Mr. Vaillant telegraphs me as follows: "Mr. Foley telegraphs me that he has no record of any contract whatever with you nor has he any knowledge of any time arrangement.—I replied that you were certainly mistaken and *that you were certainly mistaken and* that I should endeavor to refresh your recollection when I meet you here on Wednesday. You will find a record under date Aug. 25, '82 of annual contract made between R. C. Vilas & G. G. Cochran & Andrew Brown, making rates *on* lumber, logs and staves from Cincinnati, Portsmouth, O. and all points on the N. Y. P. & O. to N. Y.

20c. from Ap'l 1 to Nov. 1
25c. from Nov. 1 to Ap'l 1.

and this contract was afterwards amended to include Ironton, O. and Ashland, Ky. because my principal business from Ky. came via Ashland and had this point been excluded that traffic would have gone to Newport News, Va. each year since 1882, this contract has been renewed by Mr. Vilas and the best proof that such contract has been renewed by Mr. Vilas and the best proof that such contract has been in force, is the fact of overcharge vouchers having been made up and allowed on basis of this contract from Aug. 1882 to present time.

219 My Chicago rate on lumber, logs and staves has always for past 3 years been 30c. Nov. 1 to Ap'l 1st.
25c. Ap'l 1 to Nov. 1st.

I think no record of Chicago rates exist but ac. vouchers will prove my statement correct. Detroit has always been treated on Chicago basis taking its proper percentage of my Chicago rate.

At present I am paying the Erie Co. higher rates under my contracts than I could get elsewhere, indeed am offered 20c. from Chicago, 19c. from Cinti. and 19c. from Ashland on logs and lumber.

I will see you on Wednesday, meanwhile please look up these contracts, notably the one of Aug. 25, '82.

Yours truly, ANDREW BROWN.

DEFENDANT'S EXHIBIT 2. July 20, 1888.

NEW YORK, *Jan'y 30th*, 1885.

S. M. Felton, Jr., vice-president.

MY DEAR SIR: Will you kindly have issued and sent me, annual passes over our road for current year for the following parties, viz:

H. J. Hayden, 3d V. pres., N. Y. C. & H. R. R. R.
J. B. Dutcher, G. L. S., ag't.
M. H. Gillett, J. D. Gillett, G. V. Bartlett, S. Judd, } live stock, O. K.
Hon. Jno. R. McPherson.
Wm. Leggett, customs collector, Clifton, Ont.
J. M. Osborn, president, Ill. R. R. Fr't Ass'n.
H. O. Canfield, commissioner.
T. J. Klase, gen. ag't G. W. D. & C. & C. Phila.
Isaac Odell, ag't P. & S. S. S. Co.
H. F. Dimock, ag't Met. S. S. Co.
220 A. W. Colton, gen. ag't Wab. & Erie Lake line.
W. P. Richardson, president, Orange Co. Milk Prod. Asso.
J. F. Kilgour, manager, Penn. Blue Stone Co.
C. W. Cushman, manager, Car Tracing Ass'n.
S. S. Bullis, E. M. Bond, Andrew Brown, } local shippers.
G. W. Sheldon, import freight agent.
W. H. McIlhanney, F. F. ag't, N. Y. C. & H. R. R. R
C. M. Cottrill, ag't, Union St. B't Co., Milwaukee.
Peter Ward, ex-mayor, Newburgh.
W. D. Matthews, malt-shippers.
J. D. Archbold, president, Acme Oil Co.
F. Culver, G. F. Swift, Andrew Langdon, } Swift's dressed beef.
C. R. Heneage, C. D. Simpson, } coal-shippers.

And oblige,

Yours respectfully, R. C. VILAS,
Fr't-traffic Manager.

The following are the two vouchers referred to in Mr. Felton's testimony at page 108:

No. 722. *Individuals' & Co.'s Account.*

New York, Lake Erie & Western R. R. Co. to Andrew Brown, Dr.

Mem. No. —. Ac. claim 535½. (Address), Buffalo, N. Y.

		Dolls.	Cts.
1884.	For the following, as per bill rendered, filed in auditor's office at New York and certified by gen'l freight agent, viz:		
221			
Sept., Oct., & Nov.	Oc. in weight on 7 cars walnut logs shipped from Beverly & Platte City, Mo., to Chicago, consigned to A. Brown, J. City, Chicago to J. C., G. W. Des., Sept., '84. W. B. 1093, Oct., '84. W. Bs. 3, 4, 72, 565, 658, Nov., '84. W. B. 750, as per bill.....	97	10
	Chicago, Rock Island & Pacific R. R. Co.....	$97	10

I certify that the above account is correct; that the items therein specified were duly authorized and contracted for, and were received for the use and benefit of the New York, Lake Erie & Western Railroad Co.

S. M. FELTON, Jr., *Vice-pres't.*

I certify that the above account has been examined by me and found correct, and is hereby approved for payment.

W. FARRINGTON,
Assistant Auditor.

Countersigned:
N. S. RUTTER,
Auditor of Disbursements.

Received, —— —, 188–, of the treasurer of the New York, Lake Erie & Western R. R. Co., ninety-seven $\frac{10}{100}$ dollars, in full of the above account. Draft attached.
$97.10. —— ——.

222 Read this.—The above receipt must be dated and signed by the party in whose favor this voucher is made; or, when signed by another party, the authority for so doing must in all cases accompany the voucher; and this receipt must not be cut off from the body of the voucher.

The following draft was attached to the above:

No protest.

No. 48673. $97.10. MAY 19, 1885.

Treasurer of
New York, Lake Erie & Western Railroad Co.,
21 Cortlandt street, New York,

Pay to the order of J. B. Hoffman, agent, ninety-seven & $\frac{10}{100}$ dollars, in full for voucher.

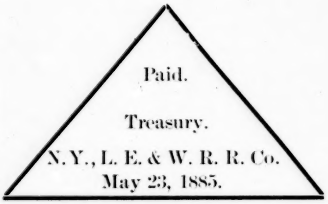
This draft is valid only when signed by Andrew Brown,
And accompanied by duplicate.
Voucher receipted.
3 J. C.

in your hands for oc. on logs, Sept. Oct. & Nov. '84.

ANDREW BROWN.

EDWARD WHITE, *Treasurer.*

The following stamped on draft:



223 No. 1797. —— account.

New York, Lake Erie & Western R. R. Co. to Andrew Brown, Dr.

Mem. No. —. (Address), Buffalo, N. Y.

		Dollars.	Cts.
1884.	For the following, as per bill rendered, filed in auditor's office at New York, and certified by gen'l freight agent, viz:		
Sept., Oct. & Nov.	Ac. claim No. 535. Oc. on 7 cars logs from West to Jersey City, cons'g'd to Andrew Brown. Billed from Chicago G. W. Des. Sept., '84. W. b. 1093, Oct., '84. W. bs. 3, 4, 72, 565, 658, Nov., '84, w. b. 750, as per bill..	345	98

Drawbacks & oc.....	$146 02
Lessee N. Y., P. & O. R. R...	107 83
Chicago & Atlantic R'y Co..	92 13
	$345 98

I certify that the above account is correct; that the items therein specified were duly authorized and contracted for, and were received for the use and benefit of the New York, Lake Erie & Western Railroad Co.

R. C. VILAS,
Freight-traffic Manager.

I certify that the above account has been examined by me and found correct, and is hereby approved for payment.

W. FARRINGTON, *Ass't Auditor.*

Countersigned:
N. S. RUTTER,
Auditor of Disbursements.

224 Received, —— —, 188–, of the treasurer of the New York, Lake Erie and Western R. R. Co. three hundred and forty-five $\frac{98}{100}$ dollars, in full of the above account.
Draft attached.
$345.98. —— ——.

Read this.—The above receipt must be dated and signed by the party in whose favor this voucher is made; or, when signed by another party, the authority for so doing must in all cases accompany the voucher; and this receipt must not be cut off from the body of the voucher.

The following draft was attached to the above:

No protest.

No. 48666. $345.98. MAY 19, 1885.

Treasurer of
New York, Lake Erie & Western Railroad Co.
21 Cortlandt street, New York,

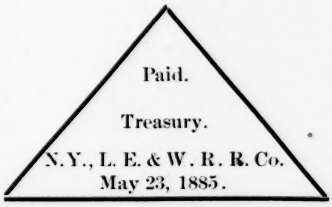
Pay to the order of J. B. Hoffman, agent, three hundred and forty-five $\frac{98}{100}$ dollars in full for voucher.

This draft is only valid when signed by Andrew Brown.
And accompanied by duplicate voucher receipted.
EDWARD WHITE, *Treasurer.*

in your hands for oc. on logs Sept. Oct. & Nov. '84.
ANDREW BROWN.

J. C. 3.

The following stamped on draft:



225 United States Circuit Court, Southern District of New York.

ANDREW BROWN, Plaintiff,
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

The defendant makes the following exceptions to the following portions of the order or decision of this court, filed in the office of the clerk of this court on the 4th day of June, 1891:

1st. To that portion thereof which overrules the first of the objections and exceptions of the defendant filed herein March 12th, 1889, and adopts as and for and makes the finding of this court that portion of the ninth finding of fact of the referee contained in his report and which finds that in the beginning of the year 1884 the alleged agreement between the plaintiff and the defendant was renewed for and during that year, and that under and in pursuance thereof the plaintiff shipped and caused to be shipped staves and other freights, being all of such freights controlled by him and intended for transportation, from Western points as aforesaid by way of the city of Jersey City to ports and places in England
226 & 227 and upon the continent of Europe so far as the defendant company furnished facilities therefor and at rates which were from time to time agreed upon between them.

2nd. To that portion thereof which overrules the second of said objections and exceptions of the defendant and adopts as and for and makes the finding of this court so much of the tenth finding of fact found by the said referee as finds that rates were agreed upon and between the plaintiff and defendant, as therein stated, or that it was agreed that rates should be computed upon shippers' weights, as therein set forth.

3rd. To that portion thereof which overrules the third of said objections and exceptions of the defendant and adopts as and for and makes the findings of this court such portion of the eleventh finding of fact found by said referee as finds that there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1884 as follows:

For rebates on account of freights and weights as aforesaid and as stated and set forth in Exhibit A, attached to the complaint, the sum of six thousand and twenty-eight $\frac{90}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weight, upon plaintiff's freights transported to Jersey City and vicinity as aforesaid, as set forth in Exhibit A as aforesaid, the sum of eleven hundred and sixty-two $\frac{70}{100}$ dollars.

228 For actual cost and expense incurred by plaintiff in unloading his freights at Weehawken, as set forth in Exhibit A aforesaid, the sum of five hundred and twenty-three $\frac{87}{100}$ dollars.

4th. To that portion thereof which overrules the fourth of said objections and exceptions of the defendant and adopts as and for and makes the finding of this court so much of the twelfth finding of fact found by said referee as finds that at or about the time in that behalf mentioned the defendant company, desiring and in

order to retain the transportation of plaintiff's freights, offered to the plaintiff and did agree to renew and continue the agreement aforesaid for and during the year 1885, and further offered and agreed to pay the plaintiff the rebates and amounts then remaining due and unpaid him under the agreement for the year 1884, as thereinbefore stated, and that the same was accordingly renewed for and during the year 1885.

5th. To that portion thereof which overrules the fifth of said objections and exceptions of the defendant and adopts as and for and makes the finding of this court the thirteenth finding of fact found by said referee, which finds that, under and — pursuance of the agreement so renewed and continued for the year 1885, the plaintiff caused to be shipped during said year, according to the terms of that agreement, large quantities of logs, timbers, planks, staves,
and other freights in accordance with the terms thereof, the
229 same being all the freights controlled by him and intended
for transportation from Western points as aforesaid, by way of Jersey City, to ports and places in England and upon the continent of Europe, so far as the defendant company furnished facilities therefor, and at rates which were from time to time agreed upon between them.

6th. To that portion thereof which overrules the sixth of said objections and exceptions of the defendant and adopts as and for and makes the finding of this court so much of the fourteenth finding of fact found by said referee as finds that the rates therein mentioned were agreed upon from time to time between the plaintiff and defendant company and that it was agreed that such rates should be computed upon shippers' weights.

7th To that portion thereof which overrules the seventh of said objections and exceptions of the defendant and adopts as and for and makes the finding of this court so much of the fifteenth finding of fact found by said referee as finds that there now remains due and unpaid to the plaintiff under said agreement upon his said shipments during the year 1885 as follows:

For rebates on account of rates and weights as aforesaid and as stated and set forth in Exhibit B, attached to the complaint, the sum of eight thousand and forty-six $\frac{58}{100}$ dollars.

For rebates of three cents per hundred pounds, shippers' weights, upon plaintiff's freight transported from Jersey City and vicinity
as aforesaid, as set forth in Exhibit B aforesaid, the sum of
230 two thousand four hundred and forty-one $\frac{49}{100}$ dollars.

For actual cost and expense incurred by plaintiff in unloading his freight at Weehawken, as set forth in Exhibit B aforesaid, the sum of seven hundred and seventy-four $\frac{20}{100}$ dollars.

8th. To that portion thereof which overrules the eighth of said objections and exceptions of the defendant and adopts and confirms the first conclusion of law found by said referee, that the defendant, The New York, Lake Erie and Western Railroad Company, is indebted to the plaintiff on account of his shipments during the year 1884 and under the terms of the agreement made for that year in the sum of seven thousand seven hundred and fifteen $\frac{47}{100}$ dol-

lars, with interest thereon since the first day of March, 1885, amounting in all at the date of said report to the sum of nine thousand five hundred and sixty-four $\frac{62}{100}$ dollars.

9th. To that portion thereof which overrules the ninth of said objections and exceptions of the defendant and adopts and confirms the second conclusion of law found by said referee, that the defendant, The New York, Lake Erie and Western Railroad Company, is indebted to the plaintiff in the sum of eleven thousand two hundred and sixty-two $\frac{27}{100}$ dollars by reason of his shipments during the year 1885, under the terms of the agreement for and during said year, together with interest thereon since the first day of March,
231 1885, amounting in all at the date of said report to the sum of thirteen thousand two hundred and seventy-eight $\frac{21}{100}$ dollars.

10th. To that portion thereof which overrules the tenth of said objections and exceptions of the defendant and adopts and confirms the third conclusion of law found by said referee, that the plaintiff is entitled to judgment against the defendant for the amounts so found due, with interest thereon as specified, amounting in all at the date of said report to the sum of twenty-two thousand eight hundred and forty-two $\frac{83}{100}$ dollars.

11th. To that portion thereof which overrules the eleventh of said objections and exceptions of the defendant and adopts and confirms the fourth conclusion of law found by said referee, that the plaintiff is further entitled to judgment for costs and disbursements as against the defendant herein.

12th. To that portion thereof which overrules the twelfth of said objections and exceptions of the defendant and adopts and confirms the refusal of the said referee to find, as requested in defendant's seventh request to find, as a matter of fact, that there was no continuing arrangement or agreement between the plaintiff and defendant providing what the rates should be on the plaintiff's shipments except the verbal arrangement made August 25, 1882, which is set forth in the fifth finding of fact requested by the defendant to be found.

13th. To that portion thereof which overrules the thirteenth of said objections and exceptions of the defendant and adopts
232 and confirms the refusal of said referee to find, as requested in defendant's tenth request to find, as a matter of fact, that said Vilas, as such general freight agent or freight-traffic manager, did not have authority to make a contract on behalf of the defendant with any shipper for special rates or special facilities or rebates or concessions in the transportation of such shipper's freight, to continue for a year, and that no such contract for a year had ever been made or attempted to be made by Vilas without being specially authorized thereto by the defendant.

14th. To that portion thereof which overrules the fourteenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's twelfth request to find, as a matter of fact, that upon receiving the notice therein mentioned the plaintiff, in consequence thereof,

ceased to ship his freight over the defendant's line and shipped 213 car-loads of logs or other lumber over other lines of railroad.

15th. To that portion thereof which overrules the fifteenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's fifteenth request to find, as a matter of fact, that the rates of freight therein mentioned were defendant's ordinary and regular rates which were charged to ordinary or casual shippers of the same kind of freight over defendant's road as was shipped by the plaintiff thereover during the period mentioned in the complaint.

233 16th. To that portion thereof which overrules the sixteenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in the defendant's sixteenth request to find, as a matter of fact, that such charges for freight were paid by the plaintiff voluntarily and without protest.

17th. To that portion thereof which overrules the seventeenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in said defendant's eighteenth request to find, as a matter of fact, that if the plaintiff were allowed to recover the amounts claimed in the complaint the balance of the freight charges paid to the defendant by the plaintiff upon the shipments mentioned in the complaint, after deducting therefrom the amounts claimed by the plaintiff as above stated, would be less than the actual cost incurred by the defendant in the transportation of said shipments.

18th. To that portion thereof which overrules the eighteenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's first request to find, as a conclusion of law that no contract or agreement between the plaintiff and defendant was in force in the year 1884, except the agreement specified in the memorandum of August 25, 1882.

234 19th. To that portion thereof which overrules the nineteenth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's second request to find, as a conclusion of law that said agreement was terminated by notice to the plaintiff on the 21st day of November, 1884.

20th. To that portion thereof which overrules the twentieth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's third request to find, as a conclusion of law that said agreement was terminated by the action of the plaintiff in November, 1884, in shipping his freights over or in diverting his shipments of logs and lumber to other lines than the line of the defendant.

21st. To that portion thereof which overrules the twenty-first of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's fourth request to find, as a conclusion of law that the plaintiff is not entitled to recover the amounts set forth in the complaint and al-

leged to be due him from the defendant on account of rebates of three cents per hundred pounds for lighterage on the shipments therein mentioned.

22nd. To that portion thereof which overrules the twenty-second of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in
235 defendant's fifth request to find, as a conclusion of law that the plaintiff is not entitled to recover the amounts set forth in the complaint and alleged to be due him from the defendant on account of deductions for shippers' weights as against railroad weights for the shipment therein mentioned.

23rd. To that portion thereof which overrules the twenty-third of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's sixth request to find, as a conclusion of law that the plaintiff is not entitled to recover the amounts claimed in the complaint to be due as a repayment of expense incurred by the plaintiff in unloading his freights at Weehawken.

24th. To that portion thereof which overrules the twenty-fourth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's seventh request to find, as a conclusion of law that the plaintiff has failed to show any contract between the defendant and himself for the payment to him of the rebates claimed in the complaint, excepting the arrangement set forth in the memorandum of August 25, 1882.

25th. To that portion thereof which overrules the twenty-fifth of said objections and exceptions of the defendants and adopts and confirms the refusal of said referee to find, as requested in defendant's eighth request to find, as a conclusion of law that the freights paid by the plaintiff to the defendant upon the shipments
236 mentioned in the complaint were paid voluntarily and the plaintiff is not entitled to recover the same.

26th. To that portion thereof which overrules the twenty-sixth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's ninth request to find, as a conclusion of law that the alleged contract or agreement set forth in the complaint was without consideration to the defendant and the plaintiff cannot recover the amounts claimed to be due thereunder.

27th. To that portion thereof which overrules the twenty-seventh of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's tenth request to find, as a conclusion of law that the alleged contract or agreement set forth in the complaint was and is illegal and void.

28th. To that portion thereof which overrules the twenty-eighth of said objections and exceptions of the defendant and adopts and confirms the refusal of said referee to find, as requested in defendant's eleventh request to find, as a conclusion of law that the defendant is entitled to judgment dismissing the complaint with

costs, including the referee's fees and stenographer's fees and other disbursements incurred herein.

29th. To that portion thereof which overrules the objections and exceptions of the defendant to the rulings of the said referee
237 during the trial of this action, as set forth in the case and exceptions duly made and filed herein, and which adopts and confirms such rulings as the rulings of this court.

Dated New York, June 4th, 1891.

BUCHANAN & STEELE,
Defendant's Attorneys, 21 Cortlandt Street, New York City.

238 At a stated term of the United States circuit court for the southern district of New York, held at the post office building, in the city of New York, on the fourth day of June, 1891.

Present: Hon. E. Henry Lacombe, circuit court judge.

ANDREW BROWN
against
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

This action having been brought on for hearing and trial before this court, without the intervention of a jury, in accordance with the rules and practice of this court, upon a case and exceptions, the report and findings of the referee heretofore filed herein upon March 7th, 1889, and all the pleadings and proceedings had herein, and this court having duly adopted and confirmed all the rulings and findings of said referee and thereupon having directed judgment for the plaintiff, and the defendant having duly made and filed its exceptions to the rulings of said court upon said trial:

Now, on motion of Buchanan & Steele, defendant's attorneys—

239 It is ordered that the defendant have leave to turn the said case and exceptions, and the exceptions to the rulings of the court so filed by the defendant, into a bill of exceptions, and same is hereby turned into and allowed as such bill of exceptions.

E. HENRY LACOMBE.

240 And inasmuch as the matters, things, and exceptions aforesaid would not otherwise appear by the record, I have settled, allowed, signed, and sealed this bill of exceptions on the prayer of said defendant, by his counsel, in accordance with the statute in such case made and provided; and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed at the trial of this action.

Witness my hand and seal this fourth day of June, 1891.

(S'g'd) E. HENRY LACOMBE.

(Endorsed:) Circuit court of the United States, southern district of New York. Andrew Brown against The New York, Lake Erie and Western Railroad Company. Bill of exceptions. Buchanan & Steele, attorneys for defendant, 21 Cortlandt street, New York.

Charles L. Atterbury, attorney for plaintiff, 120 Broadway, New York. U. S. circuit court. Filed June 4, 1891. John A. Shields, clerk.

241 Supreme Court of the United States.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, Plaintiff in Error,
against
ANDREW BROWN, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the second Monday of October, 1891, in the same term, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by James A. Buchanan, its attorney, and says that in the record and proceedings aforesaid in the above-entitled matter there is manifest error in this, to wit:

First.

The court erred in finding as a matter of fact that a contract was made and was in effect between the plaintiff in error and the defendant in error in the year 1884, as claimed in the bill of complaint of the said defendant in error. On the contrary, said court should have found, as a matter of fact, that no such contract was made or in effect at that time between said parties.

242 Second.

The court erred in finding that the said contract was not terminated in November, 1884. On the contrary, the court should have found that such contract, if it ever existed, was abrogated and terminated in November, 1884.

Third.

The court erred in finding that the said contract was renewed between the parties for the year 1885, and that at the time of such renewal the plaintiff in error promised to pay to the defendant in error the sums claimed by said defendant in error to be then due under the terms of the said contract for the year 1884. On the contrary, the said court should have found that such contract was not renewed for the year 1885, and the plaintiff in error did not promise to pay the sums which the defendant in error then claimed were due under the contract of 1884.

Fourth.

The court erred in adjudging that the said contract of 1884 and its alleged renewal for 1885 and the promise of the plaintiff in error to pay the sums claimed to be due for the year 1884 or either of them was a legal and valid contract or promise, and that the defendant in error was entitled to recover the sums claimed to be due

under them or either of them. On the contrary, the court should have adjudged that the said contracts and promise were il-
243 legal and invalid and contrary to law, and that the defendant in error was not entitled to recover the sums claimed to be due under them or either of them, or any sums whatever.

Fifth.

The court erred in refusing to find that the rates of freight stated to have been paid by the defendant in error, pursuant to the terms of the bills of lading under which his freights were transported over the railroad of the plaintiff in error, were the ordinary and regular rates which were charged to ordinary or casual shippers of the same kind of freight over the road of the plaintiff in error as was shipped by the defendant in error thereover during the period mentioned in the bill of complaint. On the contrary, the court should have found that such rates of freight were the regular and ordinary rates charged to ordinary and casual shippers of the same kind of freight over the road of the plaintiff in error as was shipped by the defendant in error thereover during the period mentioned in the bill of complaint.

Sixth.

The court erred in refusing to find as a matter of fact that upon receiving notice of the abrogation of his alleged contract the defendant in error, in consequence of such notice, ceased to ship his freight over the line of the plaintiff in error and shipped
244 two hundred and thirteen car-loads of logs or other lumber over other lines of railroad. On the contrary, the court should have so found as a matter of fact.

Seventh.

The court erred in excluding evidence offered by the plaintiff in error to prove that the net amount received by it for transporting freights for the defendant in error, after deducting the rebates which he claims, would be less than the actual cost to the plaintiff in error of such transportation.

The evidence excluded was as follows:

GEORGE H. VAILLANT, a witness called on behalf of the plaintiff in error, was sworn, and testified as follows:

"Q. State whether this business of Mr. Brown's, which gave an average revenue of $\frac{31}{100}$ths of a cent per ton for the shipments that came by Buffalo, and $\frac{24}{100}$ths of a cent per ton per mile on those coming by Salamanca, paid the Erie Company a revenue equal to the cost of its transportation.

"Objected to by plaintiff's counsel as immaterial; which objection was sustained by the referee; to which ruling of the referee the defendant then and there excepted.

"Q. Can you state, by looking at the annual report of the
245 Erie Company for the years 1884 and 1885, what the actual average cost of transportation was during those years on all kinds of freight?

"Same objection, ruling, and exception.

"Q. Was the revenue derived from Mr. Brown's shipments during the years 1884 and 1885 less than the actual cost of its transportation?

"Same objection, ruling, and exception."

Mr. S. M. FELTON, a witness called on behalf of the plaintiff in error, testified as follows:

"Mr. STEELE: I offer to show by Mr. Felton that Mr. Brown's business produced a net revenue which was less than the actual cost of transportation.

"Mr. CHOATE: I object to that as immaterial.

"This objection was sustained by the referee; to which ruling the defendant then and there duly excepted.

"Mr. STEELE: I offer to prove also by Mr. Felton what the average cost of transportation of freight on the Erie was during 1884 and 1885, and to show that Mr. Brown's business produced a net revenue less than that.

"Same objection, ruling, and exception."

Mr. FELTON further testified as follows:

"I discovered Mr. Brown, instead of being a large and important shipper, was a very insignificant one; that his business did
246 not amount finally, after these allowances, to more than six or seven thousand dollars a year; that out of the gross revenue he paid nearly one-half was paid back to him in these allowances, making the revenue less than the cost of transportation.

"Mr. CHOATE: I move to strike out that answer.
"The REFEREE: It may be stricken out.
"Mr. STEELE: I take an exception to that ruling."

Mr. JOHN KING, a witness called on behalf of the plaintiff in error, testified as follows:

"Q. And you uniformly declined to renew or make this arrangement with Mr. Brown?
"A. Every time.
"Q. Did you state to him the reason?
"A. Yes.
"Q. What was it?
"A. I said it was not profitable.
"Q. And for that reason you would not renew it?
"A. Yes; and another reason was I did not want to make contracts of that kind for a year.

"Mr. STEELE: I offer to prove by Mr. King that the net revenue from Mr. Brown's business was less than the actual cost of transportation, and for that reason it was unprofitable, and he declined to renew the contract.

"Objected to by plaintiff's counsel as immaterial; which objection was sustained by the referee; to which ruling the defendant then and there duly excepted."

247 Again, counsel for plaintiff in error offered in evidence the following statements:

"Mr. STEELE: I now offer in evidence two statements, one showing shipments stated in the complaint to be in the year 1884, the other showing shipments stated in the complaint to be in the year 1885, showing what the net revenue per ton per mile on each of those shipments was and what the average revenue on those shipments during the periods 1884 and 1885 was. I offer them for the purpose of showing that the net revenue derived from those shipments was less than the actual cost of transportation.

"Objected to by plaintiff's counsel as immaterial; which objection was sustained by the referee; to which ruling the defendant then and there duly excepted."

On the contrary, such evidence should have been admitted.

Eighth.

The court erred in admitting evidence as to other contracts made by the plaintiff in error during the period for which the defendant claims.

The evidence so admitted was as follows:

248 ROYAL C. VILAS, a witness called on behalf of the defendant in error, testified as follows:

"Q. During this period, down to the time you left, what sort of contracts did you make for freight—what kind of contracts did you make? State generally.

"Objected to by the defendant as immaterial and incompetent; which objection was overruled by the referee; to which ruling the defendant then and there excepted.

"A. Contracts that were necessary to secure traffic, soliciting and making the rates.

"Q. Did you make contracts for the year?

"Same objection, ruling, and exception.

"A. We made contracts for all kinds of times.

"Q. For all periods of time?

"A. Yes. During the period from 1882 to 1885, when I left, there were in existence what were called schedule or tariff rates. These were nominal most of the time—that is to say, we would agree upon a tariff of rates which should be published, and then

would deviate from that in order to secure traffic whenever necessities required—that is to say, we would publish tariffs upon which we had agreed with other companies, and then if it was necessary to deviate from the rates specified in such tariffs in order to secure freight, and the conditions were such that we felt we were justified in doing it, we made special rates.

249 "Q. Well, generally, with constant and regular customers, what was the practice?

"Objected to by the defendant on the ground that it is immaterial and incompetent; which objection was overruled by the referee; to which ruling the defendant then and there excepted.

"A. We always had special contracts.

"Q. Special rates?

"A. I don't remember there was a time in the history of the business that full tariff rates were absolutely paid and never deviated from at that time or some time later. We had periods—railroad men used to have periods of virtue, when they would make an agreement to maintain rates and, perhaps, live up to it for a few days, but generally went back and settled.

"Q. How was it during the period from 1882 to May, 1885, in this respect?

"Same objection, ruling, and exception.

"A. The same condition."

The same witness further testified:

"Q. State whether the same result was reached and to what extent in January, 1885, with other shippers. Was this the only case in which you had these conferences with Mr. King and received your instructions from him?

"Objected to by defendant's counsel as immaterial, incompetent, and irrelevant; which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

250 "A. Oh, no, sir; a great many other cases."

On the contrary, such evidence should have been excluded as incompetent, irrelevant, and immaterial.

Ninth.

The court erred in refusing to find that Vilas, as general freight agent or freight-traffic manager of the plaintiff in error, did not have authority to make a contract on its behalf with any shipper for special rates or special facilities, rebates, or concessions in the transportation of such shipper's freight to continue for a year, and that no such contract for a year had ever been made or attempted to be made by Vilas without being specially authorized thereto by the plaintiff in error. On the contrary, the court should have found that said Vilas did not have such authority, either through his general position or through direct authorization from the president of

the plaintiff in error, and that he had never made or attempted to make such a contract without having special authority therefor.

Tenth.

The court erred in admitting evidence tending to show that the business of the defendant in error was desirable, and that he was a satisfactory shipper, and that there were similar shippers on other lines.

The evidence so admitted was as follows:

251 ROYAL C. VILAS, called as a witness on behalf of the defendant in error, testified as follows:

"Q. What was your estimate of the desirableness of this business to the company?

"Objected to by the defendant on the ground that it is immaterial and incompetent; which objection was overruled by the referee; to which ruling the defendant then and there duly excepted.

"A. As freight-traffic manager of the Erie road, I considered it desirable to get any and all business I could at whatever rates we were authorized to make, and, in the absence of special instructions not to make certain rates or not to go below a certain basis of rates, we got all the freight we could get, and we didn't stop to figure exactly whether it paid us to handle it or not; we took it and never stopped to figure whether it cost us more than we were getting to carry it or not; I think we very often lost. There was no other regular shipper on the line who did the same kind of business as the plaintiff, excepting there were occasional car-loads which were shipped.

"Q. Were there other such shippers on competing lines of railroad?

"Objected to by the defendant as immaterial and incompetent; which objection was overruled by the referee; to which ruling the defendant then and there excepted.

"A. Yes.

252 "Q. Was there any objection to the rates you made with him or the method in which they were estimated?

"A. No; he was considered one of our most satisfactory shippers.

"Defendant moves to strike out the latter part of said answer as incompetent, irrelevant and immaterial, and not responsive to the question; which motion was denied by the referee; to which ruling the defendant then and there excepted."

On the contrary, all such evidence should have been excluded as incompetent, irrelevant, and immaterial.

Eleventh.

The court erred in refusing to strike out evidence which was received over the objection of the plaintiff in error to establish the

date upon which the defendant in error claimed he was in New York city by reference to an expense account which belonged to a Mr. Moore.

The evidence referred to is as follows:

The defendant in error, recalled as a witness on his own behalf, testified as follows:

"By Mr. ATTERBURY:

"Q. Have you ascertained the date that you came to New York and the date that you left New York when you got this pass?

"A. Yes; I came here on the 29th and got the pass on the 31st of January, 1885; that is as near as I can arrive at that.

253 "Q. When did you use the pass?

"A. The same day it was given to me.

"Q. Did you go home?

"A. I did.

"Q. Was the pass given you on the day that you used it?

"A. It was.

"Q. Was that the day on which Mr. Vilas told you that your contract would be renewed for the year 1885?

"A. Yes.

"Q. What day of the week and month was that?

"A. January 31, 1885; Saturday.

"By Mr. STEELE:

"Q. How do you fix that date?

"A. By examining an expense account which satisfied me.

"Q. Whose expense account?

"A. Mr. Moore's.

"Q. Any other way?

"A. No; except my recollection; but I verified my recollection, or rather strengthened it by looking at that account.

"Q. You have no recollection except from that account?

"A. Yes; I have a very strong recollection.

"Q. As to the date?

"A. Yes.

"Q. Why didn't you recollect it before?

"A. I did recollect it.

"Q. You swore positively that you could not recollect the date?

"A. I said it was Saturday.

"Q. I say date, not the day.

"A. No; I could not recollect it, then.

"Q. The only way you can state this date is from having seen Mr. Moore's expense account?

"A. Yes.

254 "Mr. STEELE: I move to have all this evidence in regard to the date stricken out as being hearsay.

"The REFEREE: I will allow it to stand for whatever it is worth.

"To which ruling of the referee the defendant then and there duly excepted."

On the contrary, such evidence should have been excluded because it contradicted the testimony of the defendant in error upon his direct examination, and was also hearsay evidence, and therefore inadmissible.

Twelfth.

The court erred in adjudging that the defendant in error was entitled to judgment against the plaintiff in error for the sums demanded in the bill of complaint, or any of them, together with the costs and disbursements of the defendant in error. On the contrary, the court should have adjudged that nothing whatever was due to the defendant in error, and that therefore his bill of complaint should be dismissed with costs to the plaintiff in error.

Wherefore the said plaintiff in error prays that the judgment aforesaid rendered in favor of the defendant in error and against the plaintiff in error may be reversed, annulled, and altogether held for nothing, and that the bill of complaint of the defendants in error be dismissed with costs.

J. A. BUCHANAN,
Of Counsel for Plaintiff in Error.

255 (Endorsed:) Supreme Court of the United States. The New York, Lake Erie & Western Railroad Company, pl'ff in error, ag'st Andrew Brown, def't in error. Assignment of errors. J. A. Buchanan, attorney for pl'ff in error, 21 Cortlandt street, New York city. U. S. circuit court. Filed June 11, 1891. John A. Shields, clerk.

256 Supreme Court of the United States.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Pl'ff in Error, *against* ANDREW BROWN, Def't in Error. } Joinder in Error.

And afterwards, to wit, on the 11th day of July, in October term *term*, the said defendant in error, by C. L. Atterbury, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

C. L. ATTERBURY,
Attorney for Defendant in Error.

257 [Endorsed:] United States Supreme Court. The New York, Lake Erie & Western Railroad Company, plaintiff in error, *vs.* Andrew Brown, defendant in error. Joinder in error. C.

L. Atterbury, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 17 day of June, 1891. Buchanan & Steele, attorneys for plaintiff in error. To Buchanan & Steele, attorney- for plaintiff in error. U. S. circuit court. Filed Jun- 17, 1891. John A. Shields, clerk.

258 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ANDREW BROWN, Plaintiff and Respondent,
vs.
THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant and Appellant.
} Bond for Damages and Costs.

Know all men by these presents that we, the New York, Lake Erie & Western Railroad Company, as principal, and the American Surety Company of New York, having an office and principal place of business at #160 Broadway, in the city of New York, are held and firmly bound unto the above-named Andrew Brown in the sum of fifty-two thousand seven hundred and nine and $\frac{30}{100}$ dollars, to be paid to the said Andrew Brown; for the payment of which, well and truly to be made, the said companies bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named New York, Lake Erie & Western Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the
259 above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named New York, Lake Erie & Western Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make the same good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,

[Seal of the N. Y., L. E. & W. R. R. Co.]

By JOHN KING, *Pres't.*

Attest: A. R. MACDONOUGH, *Secretary.*

Sealed and delivered in presence of—
H. G. HINTON,
As to—

AMERICAN SURETY COMPANY OF NEW YORK,

[Seal of the American Surety Co.]

By DAVID B. SICKELS, 2*d Vice-president.*
WYLLYS BENEDICT, *Ass't Sec'y.*

260 STATE OF NEW YORK, } ss:
City and County of New York, }

On this tenth day of June in the year 1891, before me personally came Augustus R. Macdonough, secretary of the New York, Lake Erie & Western Railroad Company, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of New York; that he was the secretary of the New York, Lake Erie & Western Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of directors of said company, and that he signed his name thereto by the like order as secretary of the said company.

And the said Augustus R. Macdonough further said that he was acquainted with John King, and knew him to be the secretary of said company; that the signature of the said John King subscribed to the said instrument was in the genuine handwriting of the said John King, and was thereto subscribed by the like order of the board of directors, and in the presence of him the said Augustus R. Macdonough.

GEO. E. GRANT,
[SEAL.] *Notary Public, N. Y. City & Co.*

261 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 8th day of June, 1891, before me personally appeared David B. Sickels, 2d vice-president of the American Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of New York; that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2d vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 486, of the New York Session Laws of 1881; and the said David B. Sickels further said that he was acquainted with Wyllys Benedict, and knew him to be the assistant secretary of said company; that the signature of said Wyllys Benedict subscribed to the said instrument is in the genuine handwriting of the said Wyllys Benedict, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, 2d vice-president.

(S'g'd) H. G. HINTON,
[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in N. Y. Co.

At a meeting of the board of directors of the American Surety Company held at the office of the company on the 9th day of June, 1886, on motion, it was—

"Resolved, That in pursuance of chapter 416, Laws of 1886,